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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature
OF THE
STATE OF INDIANA,

WITH TABLES OF CASES REPORTED AND CITED, AND STATUTES CITED AND CONSTRUED, AND AN INDEX.

CHARLES F. REMY,
OFFICIAL REPORTER.

JOHN W. DONAKER, Assistant Reporter.

VOL. 159.

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Acts 1897, p. 113.....	308
Acts 1897, p. 117.....	144
Acts 1897, p. 244.....	429, 544
Acts 1897, p. 253.....	501
Acts 1897, p. 255.....	215
Acts 1897, p. 287.....	550
Acts 1897, pp. 313-316.....	423, 438
Acts 1897, p. 316.....	394, 433, 434
Acts 1899, p. 13.....	76
Acts 1899, p. 26.....	577
Acts 1899, p. 193.....	387
Acts 1899, p. 231.....	152
Acts 1899, p. 247.....	215
Acts 1899, p. 376.....	424, 426
Acts 1899, p. 384.....	172, 272, 274, 544
Acts 1899, p. 422.....	577
Acts 1901, p. 283.....	577
Acts 1901, p. 475.....	213
Acts 1901, p. 511.....	273, 274
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Acts 1901, p. 565.....	97, 99, 314, 315, 316, 317, 387, 423
Acts 1901, p. 566.....	394, 395, 434

JUDGES

OF THE

SUPREME COURT

OF THE

STATE OF INDIANA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. ALEXANDER DOWLING.*‡
HON. JOHN V. HADLEY.†‡
HON. LEANDER J. MONKS.§
HON. JOHN H. GILLETT.||
HON. JAMES H. JORDAN.§

* Chief Justice at May Term, 1902.

† Chief Justice at November Term, 1902.

‡ Term of office commenced January 2, 1899.

§ Term of office commenced January 7, 1901.

|| Term of office commenced January 5, 1903.

OFFICERS
OF THE
SUPREME COURT.

ATTORNEY-GENERAL,
CHARLES W. MILLER.

REPORTER,
CHARLES F. REMY.

CLERK,
ROBERT A. BROWN.

SHERIFF,
GEORGE W. WEIR.

LIBRARIAN,
HOYT N. McCLAIN.

CASES
ARGUED AND DETERMINED
 IN THE
Supreme Court of Judicature
 OF THE
STATE OF INDIANA,
 AT INDIANAPOLIS, MAY TERM, 1902, AND NOVEMBER TERM,
 1902, IN THE EIGHTY-SIXTH AND EIGHTY-SEVENTH
 YEARS OF THE STATE.

WHICKER v. HUSHAW ET AL.

[No. 19,861. Filed June 4, 1902.]

159	1
159	610

MORTGAGES.—*Assumption by Vendee.*—*Executory Contract.*—The fact that the assumption of a mortgage indebtedness is an executory contract will not prevent the person holding the mortgage from availing himself of it while it yet remains the agreement of the vendor and vendee. pp. 3, 4.

SAME.—*Assumption by Vendee.*—*Executory Contract.*—In an action by a mortgagee to enforce a mortgage against a vendee who assumed the payment of the mortgage in an executory contract with the vendor, the burden is on the vendee to show that the deed executed by the vendor contained contractual recitals which changed the rights of the parties to the contract. p. 4.

SAME.—*Assumption by Vendee.*—*Executory Contract.*—*Expressio Unius, Exclusio Alterius*—*Ejusdem Generis.*—An executory contract for the sale of real estate provided that the vendor should sell and convey the real estate described to vendee "by good and sufficient warranty deed," the vendee to pay a certain amount in cash, upon the delivery of the deed, and assume "all unpaid taxes and mortgages shown of record, and all other liens on said lands, including the attachment proceeding now pending." The contract was consummated on the part of vendor by the execution of the deed. At the time of making the contract there was an unrecorded mort-

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gage against the land, made by vendor, of which the vendee had full knowledge. *Held*, that vendee is not personally liable for the debt secured by the mortgage. pp. 5-8.

From Fountain Circuit Court; *J. M. Rabb*, Judge.

Action by Jacob Hushaw and Margaret A. Hopton against J. Wesley Whicker to enforce the payment of a mortgage alleged to have been assumed by defendant. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed*.

L. Nebeker, J. W. Whicker and C. E. Bryant, for appellant.

I. E. Schoonover, for appellees.

GILLET, J.—On the 5th day of October, 1899, appellant and appellee Margaret A. Hopton entered into an executory contract in writing, by the terms of which the latter bound herself to sell and convey to appellant, “by good and sufficient warranty deed,” a certain tract of real estate. The obligation of appellant was expressed in said contract as follows: “Said J. Wesley Whicker, party of the second part, to pay cash in hand, on the delivery of the deed, the sum of \$1,752.50, and assume all unpaid taxes and mortgages shown of record and all other liens on said lands, including an attachment proceeding now pending.” This contract was consummated, upon the part of said Margaret, on the same day, by the execution of a warranty deed to appellant. At the time of making said contract there was an unrecorded mortgage against said land, made by appellee Margaret and held by appellee Jacob Hushaw, that had been long overdue, and appellant had full knowledge of its existence at the time he entered into said contract. The endeavor of appellees in this action was to hold appellant personally responsible for the amount of said mortgage, as upon a debt assumed. The evidence is not in the record. The complaint does not allege, and the special findings that were filed in the case do not show, any further extrinsic facts that might

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aid in determining the intent of the parties to the contract, such as the value of the land, whether there were liens against it, aside from those mentioned, and whether the parties to the contract had knowledge of the fact that the mortgage was not of record.

The cases are many in this State that recognize the right of the holder of a mortgage to avail himself of an existing agreement between the mortgagor and his vendee, by which the latter assumes the payment of the mortgage debt. These cases have not dealt with the philosophy of such a ruling, but in other states various reasons have been assigned in support of the right of the holder of such mortgage to sue upon the contract, such as a trust relationship, the equitable right of subrogation, agency, privity of contract by substitution, and the broad equity of the transaction. See note to *Baxter v. Camp*, as reported in 71 Am. St. 169, 176.

Although the point has not been urged upon our consideration by counsel, we approached the question as to the appellant's liability in this case with a doubt that was due to the fact that the contract sued on was executory, and had been consummated on the part of appellee Margaret by the execution of a deed. In a case where a corporation, by resolution, agreed to assume the bonded indebtedness of another corporation, which agreement was accepted by the latter corporation, the Supreme Court of the United States held that the bondholders could not avail themselves of the arrangement, because it constituted at most only an executory agreement *inter partes*. *Second Nat. Bank v. Grand Lodge, etc.*, 98 U. S. 123, 25 L. Ed. 75. But in the case of an executory contract, in writing, for the sale of real property, the person agreeing to purchase has not merely a *chose in action*, but in the eye of a court of equity he has an enforceable right to the land, and, on the other hand, the vendor can compel performance. For this reason we think that a promise to pay a mortgage that is a part of an executory contract to sell real estate is to be regarded as of such ultimate character that,

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upon performance by the vendor, an obligation in favor of the holder of the mortgage may attach. But for its evidentiary force, there would be no occasion for the vendor, upon executing a deed, to take a new obligation, for the promise to pay the encumbrance could be shown even as against the vendor's general warranty. As said by Mr. Jones in his work on mortgages (5th ed.), at §750: "Even a verbal promise by a purchaser to assume and pay a mortgage may be valid, and may be enforced in equity not only by the grantor but by the holder of the mortgage. * * * A covenant in the deed that the premises are free from encumbrances, or a recital that the consideration had been paid in full, does not estop either the grantor or the holder of the mortgage from proving such agreement and recovering upon it." And see, also, *Wilson v. King*, 23 N. J. Eq. 150; *Merriman v. Moore*, 90 Pa. St. 78; *Remington v. Palmer*, 62 N. Y. 31; *Taintor v. Hemingway*, 18 Hun 458; *Bolles v. Beach*, 22 N. J. L. 680, 53 Am. Dec. 263; *Carver v. Louthain*, 38 Ind. 530; *Gavin v. Buckles*, 41 Ind. 528; *Bever v. Bever*, 144 Ind. 157; *Boruff v. Hudson*, 138 Ind. 280. The execution of a deed poll may therefore be regarded as performance on the part of the vendor, leaving the matter of performance upon the part of the vendee dependent upon his prior agreement. *Barker v. Bradley*, 42 N. Y. 316, 1 Am. Rep. 521. From these considerations, we have concluded that the mere fact that the assumption of a mortgage indebtedness is in an executory contract will not prevent the person holding the mortgage from availing himself of it while it yet remains the agreement of the vendor and the vendee. See *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496; *Romaine v. Judson*, 128 Ind. 403; *Judson v. Romaine*, 8 Ind. App. 390. If before acceptance of the benefit by the creditor, a deed was made containing contractual provisions that changed the rights of the parties, it would be for the vendee to show the fact; otherwise, we think that he is bound according to the breadth of his prior assumption.

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Without the light of further extrinsic circumstances than the special findings disclose, the task of interpreting or construing the covenant of appellant is not without difficulty. The precise question is whether he is to be charged with the assumption of a mortgage lien not of record, because of the words in the contract, "all other liens," in view of the fact that in that immediate connection he has assumed all "mortgages shown of record," and in view of the character of the deed that he was to receive from the vendor. Our conclusion is that, as the case is presented, it does not appear that the appellant is personally liable for the debt that the mortgage secures.

The undertaking of appellee Margaret A. Hopton, "to sell and convey, by good and sufficient warranty deed," required that she should make a deed with the statutory covenants. *Clark v. Redman*, 1 Blackf. 379; *Linn v. Barkey*, 7 Ind. 69; *Bethell v. Bethell*, 92 Ind. 318. Doubtless, she was entitled to limit the effect of the words "convey and warrant" by restrictive language as to liens (*Jackson v. Green*, 112 Ind. 341), but it can scarcely be held, in view of the ambiguous language of the latter part of the instrument, that the contract contemplated that she was entitled to limit her covenant against encumbrances by subsequent language that would entirely cancel such undertaking. We are, therefore, able to approach the language by which it is claimed that the assumption was created with a considerable degree of assurance that there was at least a class of liens that it was contemplated that the grantor should covenant against; and from this fact it follows that the words "all other liens," in the grantee's covenant, are especially liable to be restrained by other words in the immediate context. We find such restrictive words in the provision that the grantee is to "assume all * * * mortgages shown of record." This language calls for the application of the maxim, *expressio unius, exclusio alterius*. The language restricts that which is general by that which is particular and spe-

cific. This consideration is further reinforced, when applied to unrecorded mortgages of which the grantee did not have knowledge, by reason of the fact that it can not be supposed that he would have personally undertaken to pay a class of obligations that might have been so extensive as to work his financial ruin; such an assumption would, indeed, be a leap into the dark. We are, therefore, able to affirm definitely that the words "all other liens" were not intended by the parties to break down the prior implied restriction, but that there was at least a class of mortgage liens not assumed by the grantee. Having reached the conclusion that the words "all other liens" do not serve to expand the liability of the grantee to pay liens into one of the utmost obligation, the question arises, what meaning is to be assigned to the words last quoted? We think that this is a case for the application of the *ejusdem generis* doctrine. The class of assumptions specifically mentioned are liens of record,—that is, taxes, recorded mortgages, and an attachment,—and it is our view that, under the doctrine mentioned, the words "all other liens" are to be held applicable only to liens in the same category, namely, liens of record. The maxim is ancient that "general words shall be restrained unto the fitness of the matter and person." Bacon, Max. Reg., 10. As said by Mr. Broom: "However general the words of a covenant may be, if standing alone, yet, if from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words." Broom, Leg. Max. (7th ed.), 429. The application of the maxim depends at all times upon the particular language used, and the fact that in some cases the covenants are widely separated in the instrument is an element in determining upon its application; yet, where the covenants are so closely knit together that it may be said that one intent pervades the whole, proper interpretation often requires the courts to treat general ex-

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pressions as restrained to persons or things in the same general category as those specifically mentioned, to the end that the spirit of the instrument may not be subordinated to the letter of some portion of it.

We regard the assumption of the grantee of "mortgages shown of record" as absolutely inconsistent with a construction of the contract that would make him assume mortgages not shown of record, notwithstanding the subsequent words, "and all other liens." As Lord Eldon observed, in *Browning v. Wright*, 2 Bos. & Pul. 13, 24: "What would be the use of any of the other covenants if this were general?" If appellees' construction is correct, the parties to the contract might as well have simply provided that the grantee should assume all liens. An argument in support of a construction that renders the other closely connected, specific provisions idle can not command our assent.

It is true that the court finds that the appellant knew of the existence of the Hushaw mortgage, but it is a far cry from this fact to the conclusion that appellant assumed it. In the first place, such a construction would run athwart the language of the covenant that impliedly excludes from the assumption all mortgages not "shown of record," and, in the second place, there are no facts alleged or found which would have made it antecedently probable that it was within the contemplation of the parties that appellant should pay such mortgage. To illustrate the last proposition: There is nothing in the facts found which excludes the idea that definite provision was made at the time of the execution of the contract for the discharge of such obligation by the grantor. Contemporaneously with the transaction, a draft for the amount of the debt may have been mailed to the mortgagee that did not reach him, or that he failed to realize on. So there is no force in the argument of appellees that it is against the probabilities that appellant would have paid over the purchase money relying upon his grantor's covenant.

In a case like this, where the instrument is the basis of

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the action, the appellees should have averred such extrinsic facts as they claimed existed, tending to stamp a particular meaning upon the contract, and under such averments proof might have been offered that would have warranted the conclusion that appellant assumed the mortgage; but, with the burden on appellees, we can but hold, when confined to the extent that we are to the language of the contract, that an assumption of said mortgage has not been shown.

We think that in this case we should not order judgment to go in appellant's favor on the special findings, but that a new trial should be granted, and leave given appellees to amend their complaint, if they apply for permission so to do.

Judgment reversed, with a direction to the trial court to grant a new trial, and for further proceedings not inconsistent with this opinion.

FIFER v. RITTER ET AL.

[No. 19,836. Filed June 5, 1902.]

159	8
163	494
163	540
159	8
164	437
159	8
165	623

APPEAL.—*Highways.*—*Motion to Reject Report of Viewers.*—*Record.*—A motion to reject the report of viewers, on the trial of a remonstrance for damages in a proceeding for the opening of a highway, can not be reviewed on appeal where it was not brought into the record by bill of exceptions or otherwise. *p. 10.*

SAME.—*Highways.*—*Motions in Commissioners' Court.*—A motion made in highway proceedings before the board of county commissioners, which was not renewed on appeal to the circuit court, can not be reviewed on appeal to the Supreme Court. *p. 10.*

TRIAL.—*Opening Issues.*—*Discretion of Court.*—It is within the discretion of the trial court to refuse to open the issues and permit the filing of a motion after one trial of the cause has been had, and after the cause has been venued to another county and a large amount of costs had accumulated. *p. 10.*

SAME.—*Instructions.*—*Credibility of Witnesses.*—*Weight of Evidence.*—In instructing the jury that they are the exclusive judges of the credibility of witnesses and the weight of the evidence, it is proper for the court to tell the jury that they "must" take into consideration the interest, the appearance on the witness-stand, the intelligence, and the opportunities for learning the truth of matters testified about. *p. 11.*

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HIGHWAYS.—Opening.—Damages.—Additional Fences.—When property is taken for the location of a public highway, the owner is entitled to just compensation, including pay for inconveniences imposed, and for additional fences, but such compensation need not be in money or property, but may be in benefits conferred. *p. 12.*

SAME.—Opening Highway.—Damages.—Instruction.—On the trial of a remonstrance for damages in a proceeding for the opening of a highway, an instruction that it was proper to consider as a benefit any increase to the value of plaintiff's land although like benefits accrued to all other lands affected in the community, and if the benefits resulting from the highway were all bestowed upon lands in the neighborhood other than plaintiff's and did not make the plaintiff's land more valuable, they would have no right to consider them, though open to criticism for looseness of language, did not tend to mislead the jury into thinking that it was proper to charge plaintiff any benefit that did not attach to his land. *p. 13.*

SAME.—Opening Highway.—Damages.—Instruction.—On the trial of a remonstrance for damages in a proceeding for opening a highway, an instruction that "If you find in the process of time that the proposed road will reasonably bring added benefits to this land, you may consider how much at this time the benefit would be to this land by establishing this road" is not erroneous as authorizing the jury to charge against plaintiff any future benefits that may come to the land by reason of the improvement. *pp. 13, 14.*

SAME.—Location.—Damages.—Evidence.—Where a landowner seeks damages for the location of a highway so located as to cut off a strip of his land, evidence that the value of such strip consisted solely in the timber which grew upon it is admissible. *p. 14.*

From Fulton Circuit Court; *A. C. Capron*, Judge.

Proceedings by Daniel W. Ritter and others to open highway, wherein William Fifer files remonstrance for damages. From a judgment for petitioners, remonstrant appeals. Transferred from Appellate Court, under §1837u Burns 1901. *Affirmed.*

W. B. Hess, G. W. Holman and R. C. Stephenson, for appellant.

S. Parker and H. A. Logan, for appellees.

HADLEY, J.—Appellees filed before the board of commissioners of Marshall county their petition for a public highway, and afterwards, upon a favorable report of the view-

ers, appellant filed his remonstrance for damages. The reviewers awarded him a small amount, from which award he appealed to the circuit court, where the verdict of the jury was against him. A new trial was granted him, whereupon the venue was changed to the Fulton Circuit Court. In the latter court the jury also returned a verdict adverse to appellant.

Some attempt has been made to bring before us the sufficiency of the report of the first viewers, by invoking consideration of appellant's motion to reject the same filed before the commissioners upon the presentation of said report. The question, however, can not be considered for two reasons: (1) Because the motion to reject is not brought into the record by bill of exceptions, or otherwise; and (2) because, on appeal to the circuit court, the motion was not renewed or presented. It has been decided by this court very many times that such cases on appeal to the circuit court are triable *de novo*; and while, on appeal, no question can be considered that was not presented to the commissioners,—those questions that were so presented must be brought forward and properly presented in the circuit court, the same as if they had not been raised below. *Trittipo v. Beaver*, 155 Ind. 652, and cases collated.

The record does disclose that after the first trial in the circuit court, and after the case had gone into another county for trial and a large amount of costs had accumulated, appellant requested leave of the court to refile his motion to reject the viewers' report presented to the commissioners. The court refused to open the issues and permit the motion to be filed, which action was but the exercise of a reasonable discretion, and is not reviewable.

This appeal is from the judgment of the circuit court, and, under the state of the record, the judgment comes here upon the assumption that all the proceedings in the case up to and including the appointment of reviewers to assess appellant's damages were valid. This narrows the appeal

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to the single assignment which calls in question the action of the court in overruling the motion for a new trial."

Complaint is made of certain instructions given to the jury. Number two informed the jury that they were the exclusive judges of the credibility of the witnesses and of the weight of their testimony, and that in determining these things they must take into consideration the interest, the appearance upon the witness stand, the intelligence, the opportunities for learning the truth concerning the things testified about, the apparent candor and correctness of the statements as compared with the usual and ordinary nature of things. The particular assault upon the instruction is directed against the word *must*, as being an encroachment upon the absolute and exclusive right of the jury. We can not adopt this view. *Must* is here employed in the sense of duty, and the term is equivalent to telling the jury that it was their duty to consider the matters enumerated in estimating the credibility and weight of the testimony. And it clearly was their duty. It was unquestionably their duty to decide the case according to the weight,—that is according to the convincing force, of the evidence, honestly arrived at, and just as plainly their duty to test the value of the testimony of each witness by such tests as common experience has proved to be reliable. Will any one say that a juror may discharge his duty by closing his eyes to the manner, conduct, and appearance of witnesses while delivering their testimony, and giving to the naked words of each witness full and equal probative force? The competency of evidence is one thing, and its weight another. Competency is purely a question of law for the court to declare. Its weight is a question for the jury to determine. So when a judge tells the jury that it is *proper* for them to consider the interest, manner, etc., of the witnesses, as it is usually phrased, he is but ruling as he may rightly rule that such evidence is competent; and, in searching for the fact established by the evidence, it is the duty of the

jury to consider all competent evidence that may throw light upon the truth, and it is no less essential to a correct result, and quite as much the jury's duty to consider facts and circumstances properly before them, which go to discredit a witness or to strengthen his testimony, as it is to consider the statements made by the witnesses. The cases of *Woollen v. Whitacre*, 91 Ind. 502, *Unruh v. State, ex rel.*, 105 Ind. 117, *Duvall v. Kenton*, 127 Ind. 178, and perhaps some others, so far as they may seem to hold to a different rule, are no longer authorities upon the question here involved. That which seems the more reasonable view expressed above, and which follows *Deal v. State*, 140 Ind. 354, 366, *Newport v. State*, 140 Ind. 299, 302, *Smith v. State*, 142 Ind. 288, and *Keesier v. State*, 154 Ind. 242, may now be said to be the approved rule.

The objections to the third, fourth, and eighth instructions are not urged.

By number five, the court, in substance, instructed the jury that when one's property is taken for the location of a public highway, the owner is entitled to a just compensation for what is taken, including compensation for inconveniences imposed, and for such additional fences as may reasonably be required by the opening of the highway. But it is not essential that the compensation rendered shall be in money or other property. Benefits accruing to the land upon which the highway is laid by reason of its establishment thereon, if any, are to be reckoned as compensation, and if such benefits equal the amount of damages then there can be no recovery. This was proper. See *Gas Light, etc., Co. v. City of New Albany*, 158 Ind. 268.

As to the sixth instruction, appellant complains of the following language: "If the new fences add to the value of the farm as much as it was worth to build them, then the plaintiff is not entitled to anything on this account." We see nothing improper in this.

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About two acres constituting a fringe along the margin of the river was cut off by the highway from the main farm, and further complaint is made of the sixth instruction because the court told the jury that if they found that the part cut off was rendered useless to the plaintiff, then he was entitled to recover on that account whatever the usable value of the fringe might be. The court made his meaning full and clear and favorable to the plaintiff by adding "he still owns the title, but whatever value has been taken from him,—that is, taken from his farm by this cutting off,—that he is entitled to recover."

The most earnest contention is over the seventh. After indicating the course to be pursued in summing up the plaintiff's damages, the court proceeds to say, in substance, that the benefits proper to be considered are such as attach to the land of the plaintiff, without reference to his peculiar wishes or ideas; that it was proper to consider as benefit any increase to the value of the plaintiff's land, although like benefits accrued to all other lands affected in the community; and "if you find in the process of time that the proposed road will reasonably bring added benefits to this land, you may consider how much *at this time* the benefit would be to this land by establishing this road." The court restricts chargeable benefits to those special benefits received by appellant's lands by saying, if the benefits resulting from the highway were all bestowed upon lands in the neighborhood other than the plaintiff's, and did not make the plaintiff's land more valuable, "you have no right to consider them." This instruction is open to just criticism for looseness of language, which doubtless resulted from the court addressing the jury extemporaneously, and having his words taken in shorthand,—a practice not to be commended; but, taking the charge as a whole, we do not think the jury could have been misled thereby into understanding that it was proper to charge appellant with any benefit that did not attach to his land. It can not be said that

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benefits bestowed upon his land would be affected by the fact that others received like benefits from the construction of the road.

The quoted part of this charge is attacked upon the ground that it authorized the jury to charge against the plaintiff any future benefits that may come to the land by reason of the improvement. The charge does not warrant this construction. The language is that if the jury find that in the process of time the road will reasonably bring increased benefits to the land they might consider how much *at this time* the benefit will be from establishing the road. This should not be said to mean that the jury might presently consider and charge against the plaintiff whatever benefits might be reasonably expected in the future to flow to the land from the highway, but its simple import is that the jury might consider what the opportunity which the construction of the road brought to the land for future growth and enhancement in value was worth to it. This was not erroneous.

Complaint is also made of the refusal of the court to give the jury certain instructions asked by appellant. We have carefully examined and compared each one of them with the instructions given, and find that, in so far as they correctly express the law, the substance was fully embraced by those submitted to the jury.

Certain testimony concerning the value of that part cut off next to the river, and the probable duration of an old fence, was admitted over appellant's objection. If the value of the land consisted solely of the timber that grew upon it as indicated by the answers, this was a fact proper to be shown as affecting the question of damages by having it isolated by the road from the main farm.

We find no error in the record. Judgment affirmed.

THE AMERICAN MUTUAL LIFE INSURANCE COMPANY v. MASON.

[No. 19,851. Filed June 5, 1902.]

159	15
180	15
159	15
164	330
159	15
108	358

JUDGMENTS.—*Foreign Judgment.*—*Collateral Attack.*—Judgments of the courts of any state having jurisdiction over the subject-matter and of the parties are conclusive on the merits in the other states of the Union until reversed on appeal, or set aside and vacated in a proper proceeding by the court which rendered the judgment, and are not, therefore, open to collateral attack. p. 16.

SAME.—*Action Upon Foreign Judgment.*—*Evidence.*—*Transcript.*—A transcript which shows that a special appearance was first entered and a motion made "to quash the service and dismiss the action," which was overruled and exceptions taken, that an answer was then filed, the cause tried upon its merits, and a final judgment entered, sufficiently shows that a judge was present at the trial. pp. 18, 19.

SAME.—*Foreign Judgment.*—*Transcript.*—*Presumption.*—Where from the transcript of a foreign judgment, it appears that the court where the judgment was rendered had a judge, clerk, and seal, the presumption is that the court was one of general jurisdiction, and that it had jurisdiction of the subject-matter of the action and the parties thereto. p. 19.

APPEARANCE.—*Special Appearance.*—*Waiver.*—By the filing of an answer to the merits, a defendant waives all objections to the jurisdiction of his person, but not the right to question the ruling on appeal. pp. 19-21.

From Elkhart Circuit Court; *J. D. Ferrall*, Judge.

Action by William H. Mason against the American Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. M. VanFleet and *V. W. VanFleet*, for appellant.

H. C. Dodge, for appellee.

MONKS, J.—This was an action brought by appellee upon a judgment recovered by him against appellant, a corporation organized under the laws of this State, in the common pleas court of Ashland county, Ohio. A trial of said cause by the court resulted in a finding, and, over a

motion for a new trial, a judgment in favor of appellee. The only error assigned is that the court erred in overruling appellant's motion for a new trial. The causes assigned for a new trial were: "(1) The decision of the court is not sustained by sufficient evidence. (2) The decision is contrary to law. (3) The court erred in admitting in evidence the transcript of the judgment sued upon."

Counsel for appellant insist that the transcript of the Ohio judgment, which was the only evidence given in the cause, "showed upon its face want of jurisdiction over appellant for two reasons: (1) It showed that no judge was present; and (2) that the proceedings were had upon constructive service alone."

The transcript read in evidence purports to be a copy of the proceedings of the common pleas court of Ashland county, Ohio, in the case of appellee against appellant, an Indiana corporation, wherein a judgment was rendered by that court against appellant for the sum of \$230.33 and costs.

Section 1, article 4, of the Constitution of the United States requires that full faith and credit shall be given in each state to the judicial proceedings of every other state, and authorizes congress to prescribe, by general laws, the manner in which proceedings shall be proved, and the effect thereof. This, congress has done. R. S. U. S. 1878, p. 171; §458 Burns 1901, §454 R. S. 1881 and Horner 1901.

It is settled that the judgments of the courts of any state having jurisdiction over the subject-matter and of the parties are conclusive on the merits in the other states of the Union until reversed on appeal, or set aside and vacated in a proper proceeding by the court which rendered the judgment, and are not, therefore, open to collateral attack. *Mills v. Duryee*, 7 Cranch (U. S.) 481, 3 L. Ed. 411. (For note to this case, see 1 Rose's Notes on U. S. Reports, 559-568.) *Cole v. Cunningham*, 133 U. S. 107, 111, 10

Sup. Ct. 269, 33 L. Ed. 538; *Hanley v. Donoghue*, 116 U. S. 1, 4, 6 Sup. Ct. 242, 29 L. Ed. 535; *Christmas v. Russell*, 5 Wall. 290, 302, 18 L. Ed. 475, and cases cited; *Kingman v. Paulson*, 126 Ind. 507, 22 Am. St. 611; *Westcott v. Brown*, 13 Ind. 83; *Mutual, etc., Ins. Co. v. Phenix, etc., Co.*, 108 Mich. 170, 172, 66 N. W. 1095, 34 L. R. A. 694, 62 Am. St. 693, 694 and note p. 697; *Memphis, etc., R. Co. v. Grayson*, 88 Ala. 572, 7 South. 122, 16 Am. St. 69 and note; *Semple v. Glenn*, 91 Ala. 245, 6 South. 46, 24 Am. St. 894, 897; *Peet v. Hatcher*, 112 Ala. 514, 527-530, 21 South. 711, 57 Am. St. 45, 54-56; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 179-182, 64 N. W. 751, 51 Am. St. 881, 883-885; *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 32 Am. St. 202, 211, 212 and note; *Fireman's Ins. Co. v. Thompson*, 155 Ill. 204, 40 N. E. 488, 46 Am. St. 335, 338, 339; *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 398, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. 872, 877, 878; *Barnes v. Gibbs*, 31 N. J. L. 317, 86 Am. Dec. 210 and note; *Dudley v. Lindsey*, 9 B. Mon. (Ky.) 486, 50 Am. Dec. 522, 524; *Cook v. Thornhill*, 13 Tex. 293, 65 Am. Dec. 63; *Bank v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683; *Fisher v. Fielding*, 67 Conn. 91, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. 270; *Weeks v. Harriman*, 65 N. H. 91, 18 Atl. 87, 4 L. R. A. 744, 23 Am. St. 21 and note; *Hallum v. Dickinson*, 54 Ark. 311, 313-315, 15 S. W. 775; *Thomas v. Morrisett*, 76 Ga. 384, 387-391; *Harrington v. Harrington*, 154 Mass. 517, 28 N. E. 903; *McMahon v. Eagle Life Assn.*, 169 Mass. 539, 48 N. E. 339, 61 Am. St. 306; *Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. 304; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Tell v. Yost*, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; *Kitchen v. Bellefontaine Nat. Bank*, 53 Kan. 242, 36 Pac. 344, 42 Am. St. 282; *Rankin v. Goddard*, 54 Me.

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28, 89 Am. Dec. 718; *Rankin v. Goddard*, 55 Me. 389; Note to *Kelly v. Kelly*, 42 Am. St. 389, 398; VanFleet, Collat. Attack, §§845-847; 2 Black, Judg., §§856, 857, 859, 883; Freeman, Judg. (4th ed.), §§559, 560.

The same rule has been declared by a number of courts in regard to the judgments of courts of foreign nations. VanFleet, Collat. Attack, §850; *Baker v. Palmer*, 83 Ill. 568, 572; *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Dunstan v. Higgins*, 138 N. Y. 70, 74, 33 N. E. 729, 20 L. R. A. 668 and note, 34 Am. St. 431; *McMullen v. Richie*, 41 Fed. 502, 8 L. R. A. 268; *Hilton v. Guyott*, 42 Fed. 249; *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

It has been held that such judgments of the courts of any state are entitled to the same faith, credit, and effect in every other court in the United States which they have in the state where rendered, and whatever pleas would be good to a suit thereon in such state, and none other, can be pleaded in any other court in the United States. *Mills v. Duryee*, 7 Cranch (U. S.) 481, and cases cited, *supra*; *Hampton v. McConnell*, 3 Wheat. (U. S.) 234, 4 L. Ed. 378; 2 Freeman, Judg. (4th ed.), §§560, 561.

While the proceedings of said court copied into the transcript do not give the name of the judge who presided in said cause, such transcript does show that appellant by counsel first entered a special appearance, and moved the court "to quash the service and dismiss the action;" that this motion was overruled, to which ruling appellant excepted; that afterwards appellant filed an answer to the complaint, and the cause was tried upon the merits, and a verdict returned in favor of appellee, after which appellant filed a motion for a new trial, which was overruled, and final judgment was rendered against appellant by the court. Instead of said transcript showing that no judge was present, as contended by appellant, it clearly appears therefrom that a judge presided at the trial, made rulings,

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and allowed exceptions thereto, and rendered final judgment on the verdict, and that said court had a clerk, seal, and sheriff.

The judicial proceedings in which the judgment sued upon was rendered by said court were authenticated by the certificate of the clerk of said court, with the seal thereof annexed, and by the certificate of the judge of said court in all respects as required by the act of congress. §458 Burns 1901, §454 R. S. 1881 and Horner 1901.

As it clearly appears that said court had a judge, clerk, and seal, the presumption is that the same was a court of general jurisdiction, and that it had jurisdiction of the subject-matter of the action and of the parties thereto, and that the proceedings were regular and according to the laws of Ohio, at least until want of jurisdiction is shown. *Bailey v. Martin*, 119 Ind. 103, 108, 109; *McMillan v. Lovejoy*, 115 Ill. 498, 500, 501, 4 N. E. 772; *Van Norman v. Gordon*, 172 Mass. 576, 579, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. 304 and cases cited; *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68; *McMahon v. Eagle Life Assn.*, 169 Mass. 539, 48 N. E. 339, 61 Am. St. 306; Note to *Kelly v. Kelly*, 42 Am. St. 398; *VanFleet*, Collat. Attack, §§845, 846, 847; 2 Freeman, Judg. (4th ed.), §565.

Neither does the record of the Ohio judgment show that the same was rendered upon constructive service alone. It is well settled that a defendant, whether a resident or non-resident, by a general appearance to an action waives all objections based on the want of the issuance of process or the service or the return thereof, or defect of whatever nature therein, and thereby gives the court full and complete jurisdiction over his person. 3 Ency. Law & Proc., 514-523; 2 Ency. Pl. & Pr., 639-651; *Louisville, etc., R. Co. v. Stover*, 57 Ind. 559; *Louisville, etc., R. Co. v. Nicholson*, 60 Ind. 158; *Wabash, etc., R. Co. v. Lash*, 103 Ind. 80, 85; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315, 321, and cases cited; *Nesbit v. Long*, 37 Ind. 300;

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Day v. Henry, 104 Ind. 324, 325; *Hammond v. Hammond*, 21 Ohio St. 620; *Cleveland, etc., R. Co. v. Mara*, 26 Ohio St. 185; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Handy v. Insurance Co.*, 37 Ohio St. 366; *Myers v. Smith*, 29 Ohio St. 120. .

A defendant who files an answer to the merits, or in any manner attacks plaintiff's case, thereby makes a general appearance, and gives the court full jurisdiction over the person of such defendant. 3 Ency. Law & Proc., 505-509; 2 Ency. Pl. & Pr., 632-639; *First Nat. Bank v. United States, etc., Co.*, 105 Ind. 227, 236, 241; *Pressley v. Lamb*, 105 Ind. 171, 187, 188; *Brake v. Stewart*, 88 Ind. 422; *McCarthy v. McCarthy*, 66 Ind. 128, 132; *Long v. Newhouse*, 57 Ohio St. 348, 370, 49 N. E. 79, and cases cited; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 210, 24 N. E. 269, 7 L. R. A. 710; *Mason v. Alexander*, 44 Ohio St. 318, 327-331, 7 N. E. 435; *Smith v. Hoover*, 39 Ohio St. 249; *Handy v. Insurance Co.*, 37 Ohio St. 366; *Maholm v. Marshall*, 29 Ohio St. 611; *Brundage v. Biggs*, 25 Ohio St. 652; *Schaefer v. Waldo*, 7 Ohio St. 238; *Evans v. Iles*, 7 Ohio St. 233.

Appellant by filing its answer to the complaint, although after the motion "to quash service and dismiss the action" was overruled, entered a full appearance to the action, and gave the Ohio court full jurisdiction over it, at least from that time, and said judgment is binding upon appellant until reversed on appeal or set aside and vacated by a proper proceeding in the court which rendered the judgment. *Kingman v. Paulson*, 126 Ind. 507, 509, 510, 22 Am. St. 611.

It is true that appellant did not, by filing its answer to the complaint, and thus entering a full appearance to the action, and giving the court full jurisdiction over it, after the court had ruled on the motion as to jurisdiction, and exceptions had been saved as to such ruling, waive the right, if the cause was appealable, on appeal, to present for review

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the ruling of the court on the motion as to jurisdiction, and secure a reversal if the same was erroneous. 2 Ency. Pl. & Pr., 629, 630; 3 Ency. Law & Proc., 525, 526; Elliotts' App. Proc., §§677, 678; *Perkins v. Hayward*, 132 Ind. 95, 100, 101; *Chandler v. Citizens Nat. Bank*, 149 Ind. 601, 603.

Said judgment having been rendered against appellant after a full appearance by it, and trial upon the merits, thus giving full jurisdiction over its person, it is clear from the authorities cited in this opinion that the action of the Ohio court in overruling the motion "to quash service and dismiss the action," even if erroneous, can not be reviewed or called in question in this action. *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525, and cases cited; *Kingman v. Paulson*, 126 Ind. 507, 509, 510; *Westcott v. Brown*, 13 Ind. 83, 85, 86.

It is not necessary, therefore, to determine whether or not appellant, by the use of the words "and dismiss the action" in said motion, entered a general appearance to the action.

Judgment affirmed.

WILSON ET AL. v. WARD ET AL.

[No. 19,847. Filed June 6, 1902.]

SALES.—Warranties.—Expiration.—Action.—Where a warranty accompanying the sale of a horse provided that it should be null and void after a specified date, the failure to sue or give notice of the breach of the warranty within such time amounts to a waiver of any right of action upon the warranty.

From Howard Superior Court; *Hiram Brownlee*, Judge.

Action by Edward L. Wilson and others against Harry Ward and others on a breach of warranty. From a judgment for defendants on demurrer to complaint, plain-

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tiffs appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. B. Joyce, B. F. Harness and W. R. Voorhis, for appellants.

J. C. Blacklidge, C. C. Shirley and C. Wolf, for appellees.

GILLETT, J.—This was a suit commenced by appellants against appellees, on a written warranty that accompanied the sale of a stallion. A demurrer was sustained to each paragraph of appellant's complaint, and they assign said ruling as error. It is alleged that the instrument sued on was executed February 6, 1899. The action was instituted June 12, 1900. The contract contains the following words: "This contract or guarantee to be null and void May 1, 1900." Neither paragraph of the complaint alleges that complaint was made within the time, that the horse did not fulfil the provisions of the warranty.

We need not determine whether the language we have quoted amounted to an agreement not to sue after the expiration of the time fixed. At the least, we think that it must be held that the omission to sue, or give notice of the breach, within the time is a waiver of any right of action upon such warranty. In *Chapman v. Gwyther*, L. R., 1 Q. B. 463, the warranty that was given upon the sale of a horse was as follows: "Warranted sound for one month." It was held that a suit could not be maintained upon such warranty after the expiration of such time, where complaint had not been made of the unsoundness of the horse within one month of the date of the sale. The court below did not err in sustaining the demurrer to each of appellants' paragraphs of complaint.

Judgment affirmed.

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ADAMS v. McLAUGHLIN.

[No. 19,869. Filed June 6, 1902.]

BROKERS.—Commissions.—Complaint.—A complaint by a real estate broker for commission alleging that defendant employed him to sell certain real estate agreeing to pay him a specified amount if he found a purchaser, and that he sold the land, that the owner executed a deed and received the purchase money, but refused to pay the commission, is good against a demurrer. *p. 24.*

SAME.—Commissions.—Evidence.—In an action by a broker for commission for the sale of real estate, evidence offered by defendant that he had employed another broker who attempted to dispose of the farm to certain persons who had obtained information concerning it from plaintiff was properly rejected. *pp. 24, 25.*

From Jay Circuit Court; *J. M. Smith*, Judge.

Action by Charles W. McLaughlin against Daniel L. Adams for commissions for sale of real estate. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

W. H. Williamson, F. H. Snyder and S. A. D. Whipple, for appellant.

J. J. Moran, E. E. McGriff and G. W. Bergman, for appellee.

DOWLING, C. J.—Action by appellee, a real estate broker, to recover from appellant commissions alleged to be due upon a sale of a farm. The complaint was in two paragraphs. The first stated that the appellee was a real estate broker; that the appellant employed him to sell a tract of land situated in Jay county, containing eighty acres, and agreed to pay him a commission of \$100 if he would find a purchaser for said real estate; that the appellee advertised said land, and afterwards sold it to one Beach for \$3,000; that the purchase money was paid by Beach, and a deed was executed and delivered to him; that the appellee performed all of the conditions of said agreement on his part, but that the appellant refused to

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pay said sum of \$100, etc. The second paragraph of the complaint, in addition to the averments contained in the first, alleged that the appellant was the agent of one Bobb, who owned the real estate which appellee was employed to sell, and that the appellant had authority from the owner to sell said land, and employed the appellee to find a purchaser, etc. A demurrer to each of these paragraphs was overruled. The appellant answered in denial of the complaint. The cause was submitted to a jury for trial, and a verdict was returned for the appellee. Over a motion for a new trial, the court rendered judgment on the verdict. The errors assigned and not waived are the rulings of the court on the demurrers to the complaint, and on the motion for a new trial.

The complaint avers that the appellant employed the appellee to sell the real estate, and agreed to pay him \$100 as commissions if he found a purchaser. It alleges that the appellee sold the land, and that the owner executed a deed to the purchaser, and received the purchase money. The pleading was sufficient. It stated the terms of the contract; performance by the appellee; a breach by the appellant; the special damages sustained by the appellee by reason of the breach; and that such damages were due and unpaid. Nothing more was necessary. No question as to the nature of the services to be performed by a real estate broker is presented by the demurrers, and the cases of *Stewart v. Murray*, 92 Ind. 543, 47 Am. Rep. 167, *Wilson v. Dyer*, 12 Ind. App. 320, and *Platt v. Johr*, 9 Ind. App. 58, referred to by appellant's counsel, do not apply.

Nineteen reasons are assigned for a new trial. Those discussed are the second, which is that the verdict was not sustained by sufficient evidence, and fifteen others founded upon the exclusion of evidence by the court. The evidence fully sustains the verdict. Indeed, the principal point of controversy, as shown by the testimony of the appellant himself, seems to have been whether the appellee should have

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the whole commission of \$100, or divide it with another broker who also had been employed by appellant to sell the land. But even if the statements of the appellant, as a witness on his own behalf, will not bear this construction, there was evidence which supported every allegation of the complaint, and the jury thought it of sufficient credibility and weight to entitle the appellee to a verdict.

The court refused to permit the appellant to prove by the appellee, and by witnesses Beach and Hearn, certain facts tending to show that Hearn, another broker, had some connection with the sale of the farm to Beach. The evidence was properly excluded. If the appellee was employed to sell the land, or to find a purchaser for it, and if he did find such purchaser and effect a sale, his right to compensation was not impaired by the fact that the appellant had employed another broker also, who attempted to dispose of the farm to some of the persons who had obtained information concerning it from the appellee. *Northwestern Life Ins. Co. v. Williams*, 98 Ind. 403, 407; *Hoadley v. Savings Bank, etc.*, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321 and notes; *Platt v. Johr*, 9 Ind. App. 58, 60.

The motion for a new trial was properly overruled. Judgment affirmed.

CITIZEN'S STREET RAILROAD COMPANY v.
STOCKDELL.

[No. 19,269. Filed November 26, 1901. Rehearing denied
June 6, 1902.]

APPEAL AND ERROR.—Trial.—Misconduct of Witness.—No question is presented on appeal as to the misconduct of plaintiff while on the witness stand, where no objection was made to such conduct at the time. *p. 27.*

EVIDENCE.—Street Railroads.—In an action against the Citizens Street Railroad Company for damages for personal injuries alleged to have been sustained by plaintiff while a passenger on defendant's car on Senate avenue in the city of Indianapolis, there was no evidence that defendant owned or operated a street rail-

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road on Senate avenue, or that plaintiff was a passenger upon one of its cars. Defendant introduced in evidence a map showing the tracks of a street railroad on Senate avenue marked "Citizens St. R. R." and a witness for defendant testified that he was employed by the Street Railroad Company of Indianapolis as a motorman, and at the time of the accident was running a car on Senate avenue. *Held*, that the evidence was insufficient to support a verdict for plaintiff. Hadley, J., dissents. *pp.* 27-33.

APPEAL AND ERROR.—*Instructions.*—*Rules of Court.*—The action of the court in giving or refusing to give certain instructions will not be reviewed on appeal, where neither the pages and lines of the record where the instructions may be found, nor the substance of any of the instructions, are given as required by the rules of the Supreme Court. *p.* 33.

SAME.—*Failure to Discuss Error.*—*Waiver.*—Exceptions to the decisions of the court upon the motion of appellant for an order of court requiring the jury to make further answers to certain interrogatories are waived by failure of appellant's counsel to discuss them. *pp.* 33, 34.

From Hancock Circuit Court; *C. G. Offutt*, Judge.

Action by Ellen B. Stockdell against the Citizens Street Railroad Company for personal injuries. From a judgment for plaintiff, defendant appeals. *Reversed.*

F. Winter, W. H. Latta, E. Marsh and W. W. Cook, for appellant.

W. J. Beckett, F. Durham and A. C. Harris, for appellee.

DOWLING, J.—This is an action for damages for a personal injury alleged to have been occasioned by the negligence of the appellant. Answer in denial. Trial by jury, and a verdict in favor of appellee. Motion for a new trial overruled. Judgment for appellee.

The complaint alleged that the appellant, the Citizens Street Railroad Company, was, on June 19, 1897, a corporation owning and operating a street railroad, the cars of which were propelled by electricity, in the city of Indianapolis; that one of the lines of said railroad was situated upon north Senate avenue, a public highway of said city; that on said day the appellee took passage on one of the open cars of said railroad company to go to her home in said

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city, and that she paid her fare as such passenger; that she wished to leave the said car at the intersection of Senate and Indiana avenues, and that, as said car approached the said intersection, she gave the proper signal to the conductor to stop the car, which he did; that while she was in the act of alighting, after the car stopped and when she was exercising due care and diligence, the appellant negligently started the said car, thereby hurling her to the street and inflicting severe and permanent injuries upon her, without fault upon her part, etc.

The only error properly assigned and not waived by the appellant is the refusal of the court to grant a new trial. The reasons for the motion discussed by counsel for appellant are: (1) That the appellee, during the progress of the trial, was guilty of misconduct; (2) that the damages are excessive; (3) that the verdict is not sustained by sufficient evidence; (4) that the appellant has discovered new evidence material for it, which it could not with reasonable diligence have discovered and produced at the trial; and (5) that the court erred in giving and in refusing to give certain instructions.

1. It is charged in the motion for a new trial that the plaintiff was guilty of misconduct while on the witness-stand, by making a feigned and theatrical display of distress and emotion, and an affidavit to this effect is filed with said motion. No objection having been made by the appellant to the conduct of the appellee at the time referred to, the question of its propriety was not presented to the trial court, and is not before us on this appeal.

2. It will not be necessary for us to determine the question whether or not the damages were excessive as the judgment must be reversed upon other grounds, and this question must be decided upon another trial, by another jury, and perhaps upon different evidence.

3. Was the evidence sufficient to sustain the verdict? The appellant insists that it was not, for the reason that

there was no proof that the Citizens Street Railroad Company owned or operated any line of railroad or cars on Senate avenue, or elsewhere, in the city of Indianapolis, at the time of the accident, or that the appellee was at any time received by it as a passenger upon any car owned, controlled, or operated by said appellant. The averments in the complaint that the appellant, the Citizens Street Railroad Company, owned and operated the railroad, and that the appellee was received by it as a passenger whom it undertook to carry safely, were of the most material character, and the facts so alleged constituted the very foundation of the appellee's claim for damages. Each of these allegations was expressly denied and was put in issue by the answer of the appellant. Neither the appellee herself, nor any witness called by her, testified that the accident to the appellee occurred when she was a passenger upon the railroad of the appellant, or that the car in which the appellee was being carried was owned or operated by the Citizens Street Railroad Company.

It is contended, however, on behalf of the appellee, that a map or plat introduced by the appellant showed that the Citizens Street Railroad Company had a double line of tracks on Senate avenue at the time the appellee was injured. It is also contended that the map showed that the car on which the appellee was a passenger was on the east track of the North Indianapolis line going north, and that it stopped at the crossing of Vermont street, being the point where the appellee was injured. This last proposition is, however, wholly unsupported by the map. It is not claimed by the appellee that there was any direct proof that the Citizens Street Railroad Company owned or operated the street railroad on Senate avenue, nor that the appellee was a passenger upon one of its cars. But it is said in argument that "it is nowhere disputed in the whole record that the appellant was in charge of the car upon which the appellee was a passenger; that the record shows that the car

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was upon the track of the appellant, and that the motorman was in charge of the car, and that he was in the employ of the railroad company." "From these facts alone," it is said, "the jury were warranted in finding, as an inference of fact, that the car was in charge of the appellant's servant on appellant's track." "The appellant being the defendant in the case did not deny that the car upon its track was its car, although they put the motorman on the stand as their witness to prove that he was in charge of this car. Any reasonable man would draw from these facts the inference that the car was operated by the appellant." The cases of *Evansville, etc., R. Co. v. Snapp*, 61 Ind. 303, and *Evansville, etc., R. Co. v. Smith*, 65 Ind. 92, are referred to in support of the proposition that, in the absence of direct or positive evidence that the appellant was the owner of, or operated, the railroad on which the accident occurred, the jury were authorized to infer such ownership, and that the appellant operated the railroad, from the fact that there was a street railroad on Senate avenue, and that there was no evidence that any other person than the appellant owned and operated it.

A map was given in evidence by the appellant, and one Thomas B. McMath, a civil engineer in the employment of the Indianapolis Street Railroad Company, testified as follows concerning it: "Q. State whether or not, last night, at my request you made measurements and a plat of the location known as the corner of Senate avenue and Vermont street? A. I did. Q. And this map, which I show you, did you make that? A. Yes, sir. * * * Q. Now, what is represented by the two sets of parallel lines which run north and south on Senate avenue on either side of what appears to be the center of the street? A. Those lines show the location of the railroad tracks as they existed about six or eight weeks ago. Q. They are the street railway tracks? A. Yes, sir. Q. The tracks are now torn up? A. Yes, sir." The map referred to purports

to contain an outline of a portion of Senate avenue lying south of the corner of Senate avenue, Indiana avenue and Vermont street, together with short sections of those streets, and was prepared nearly two years after the accident to the appellee by the civil engineer of another street railway company. The lines of a few lots on either side of Senate avenue are laid down, and their dimensions are marked in figures on the map. Near the middle of Senate avenue are two sets of parallel lines running north and south along that street, and in the middle of the two lines on the east side are the words and letters "Citizens St. R. R."

The appellee testified that on the 19th of June, 1897, she took a car at English avenue and Harrison street, and remained on the same until she arrived at Illinois and Washington streets, where she changed and took a North Indianapolis open car. At the proper time she raised her hand for the car to stop on the corner of Senate avenue and Vermont street. The car stopped at the usual place on the corner of Senate avenue and Vermont street, and she got up, and was about to get off, when the car was suddenly started, and she fell. A witness testified that at the time of the trial he was employed by the street railroad company of Indianapolis, and that in 1897 he had been a motorman of the street railway company, but he wholly failed to state the name of the company.

Are these facts sufficient to prove that the appellant owned and operated the street railway on Senate avenue at the time of the accident, and that the appellee was then and there a passenger upon one of the appellant's cars? Or, are such facts sufficient to authorize the jury to infer that the street railroad on Senate avenue was owned and operated by the appellant, and that the appellee was a passenger upon one of appellant's cars? The name of the Citizens Street Railroad Company was not once mentioned by any witness. If the map had not been introduced, its name would not have occurred in the evidence. It does not ap-

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pear whether there is but one street railroad company in the city of Indianapolis, or more than one. Neither was there any proof from which the jury could determine what company or companies ran cars over the line of railroad on Senate avenue.

A material fact, not admitted, can be established in courts of justice in no other way than by evidence. Such evidence may be direct and positive, or it may be circumstantial. But whatever its character, it must be sufficient to establish the fact it is intended to prove. When a defendant, by a proper pleading, denies every material allegation of the complaint, no presumption that he does not controvert a material fact can be indulged. Having denied the matters stated in the complaint, he is not required to admonish the plaintiff at any stage of the trial that he must introduce proof of any fact necessary to make out his case. That the fact is well known, and readily proved, does not excuse the party on whom the burden rests from making proof of such fact.

Evansville, etc., R. Co. v. Snapp, 61 Ind. 303, was an action against a railroad company for killing stock. Among other testimony was the following: William Moring, a witness for the appellant testified: "I was a section-boss on the Evansville and Crawfordsville railroad at the time the horses were killed. They were killed this side of Griswold station. I went there to see about the horses being killed." And John Racy, a witness for the appellant, testified: "I was working on a section of the E. & C. railroad at the time the horses in controversy were killed; * * * they jumped the fence and got in on the track that way; * * * we had run the gray out many times; he had been a great bother to us; the fence was used for a partition fence for both the railroad and the pasture." In deciding the case the court say, by Howk, J.: "In the case at bar, there was no direct or positive evidence adduced upon the trial that the appellant was the owner of, or operated, the railroad

upon which the appellee's mare was run over and killed. The evidence showed that the mare was run over and killed on the Evansville and Crawfordsville Railroad. The appellant, the Evansville and Crawfordsville Railroad Company, was sued for the killing of said mare on its railroad, and appeared to, and was there before the jury defending, the action. There was not a particle of evidence adduced upon the trial tending to show that the railroad in question was owned or operated by any other person or corporation than the appellant; but it seems to have been assumed and taken for granted, as a fact about which no evidence was needed, that the railroad was owned and operated by the appellant at the time the appellee's mare was run over and killed thereon. Under such circumstances, and the evidence on the trial, it seems to us that the jury trying the cause might have fairly and reasonably inferred and found that the appellant owned and operated the railroad in question at the time the appellee's mare was killed thereon; and especially so, in the absence of any evidence whatever from which it could possibly be inferred that such railroad was owned or operated by any other person or corporation than the appellant."

It will be seen from the foregoing extract from the opinion that there was much evidence in the case of the *Evansville, etc., R. Co. v. Snapp, supra*, from which the jury could infer that the railroad was owned and operated by that corporation. The witnesses described themselves as employees of that company. They spoke of the track of that company. They went as servants of the company "to see about the horses being killed." They declared that the gray "had been a great bother to us." Here was evidence which justified the inferences which were made from it. But, unless it appeared from some statement in the record that "it was assumed and taken for granted as a fact about which no evidence was needed that the railroad was owned and oper-

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ated by the appellee," the proper proof of those facts was indispensable to the success of the plaintiff.

In the case of *Evansville, etc., R. Co. v. Smith*, 65 Ind. 92, the court say: "There was evidence introduced on the trial to the effect that the appellant owned and operated the railroad. There was no direct and positive evidence introduced to show that the appellant owned the locomotive and cars with which it operated its line of railroad; but it seems to us that the court trying the cause might have fairly and reasonably inferred and found from the evidence adduced, in the absence of any evidence to the contrary, that the appellant operated its railroad with its own locomotive and cars."

In the case before us, no witness testified to the existence, even, of such a corporation as the Citizens Street Railroad Company. There was no evidence that it owned a railroad, or that it operated one. The map, with its lines and letters, did not supply the requisite proof that the appellant owned and operated a railroad on Senate avenue, and that the appellee was received and carried by it as a passenger. We think it entirely clear that there was a failure of proof of the allegations that, at the time of the accident, the appellant owned and operated the railroad on which the appellee was being carried as a passenger.

4. The discovery of new evidence is another reason for which a new trial was demanded, but, as this question can not arise upon another trial, it need not be considered by us.

5. The appellant complains of the action of the court in giving certain instructions, and in refusing to give others, but neither the pages and lines of the record where the instructions may be found, nor the substance of any of them, are given as required by rule twenty-six (rules 1889) of this court, and we will not review them.

The exceptions to the decisions of the court upon the motion of appellant for an order requiring the jury to make

further answer to interrogatories numbered thirteen, fifteen, and sixteen are waived by the failure of counsel to discuss them.

For the error of the court in overruling the motion for a new trial, the judgment is reversed, with instructions to sustain said motion, and for further proceedings in accordance with this opinion.

DISSENTING OPINION.

HADLEY, J.—I find myself unable to agree with the majority that there was not sufficient evidence to warrant the jury in finding that the defendant was the wrongdoer. I concede that the record discloses no direct or positive evidence that the defendant was operating the car upon which the plaintiff was injured, or that it owned the car, or even owned a railroad in the city of Indianapolis. But it is a familiar principle that inferences which naturally arise from facts proved may be indulged as evidence, and, where they arise to that degree of cogency and force which becomes convincing, they may be accepted as proof.

This is the case made by the record: The plaintiff charges in her complaint that the defendant owns and operates a street railroad in the city of Indianapolis, which, among other streets, runs through Senate avenue; that she took passage on one of the defendant's cars to go to her home in Senate avenue, and paid her fare to the conductor of the car; that while such passenger, and when engaged in alighting from the car at her home in Senate avenue, she was injured by the negligence of the defendant's servants in charge of said car. The defendant was properly brought into court to answer this charge. It employed counsel, filed its answer, cross-examined the plaintiff's witnesses, introduced and examined nine of its own witnesses exhaustively concerning all the happenings connected with the accident, among its witnesses being the motorman who was running

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the car, and a civil engineer, who, upon the request of the defendant's attorney, made an accurate map drawn to scale of the place of the accident and its environments. The map so made was introduced in evidence by the defendant, and while testifying concerning the same the engineer explained particular things indicated by it. Among other things he explained two exterior parallel lines running north and south as indicating Senate avenue. Between these exterior lines and near the middle of the street are four parallel lines which he explained as representing the street car tracks. Between the two east lines, explained as street car tracks, and near the spot where the plaintiff received her injuries, appear the word and letters printed in pencil "Citizens St. R. R." This word and letters were not explained by the engineer, or any other witness. There were other words and figures in pencil and in ink on the map that were not explained or identified by the engineer, but obviously denoting distances, and names of streets, places, and properties. The map showed the situations at that part of Senate avenue as they previously existed, the street railroad tracks, five or six weeks before the trial, having been taken up at that place and removed. The defendant prepared, and at the close of the evidence requested the court to give to the jury, fourteen different instructions, each and every one of which related exclusively to the respective duties of the parties growing out of the relation of passenger and carrier.

It is shown that, from one end of the trial to the other, while engaged in presenting its defense to the court and jury, the defendant did not, by act, special pleading, evidence, or request, make any denial, or show of denial, of being the responsible party, or suggest, or attempt to prove that the injuring car was being operated by another; that four days were consumed in contesting the merits of the case, when the appellant could have ended the trial in an hour by showing that it was not answerable for the negli-

gence complained of, and by every step taken, by every question asked of a witness, by every item of evidence offered, by every request for instructions, it acted, in the presence of the court and jury, as if its responsibility for the management of the car was confessed. Were the court and jury to shut their eyes to all this? Nor is this all. The appellant produced, as a witness, the motorman who was running the car by which the plaintiff was injured, and of whom appellant asked the following question: "How long have you been in the employ of *the company* as motorman?" and who answered, since 1894, and who testified that at the time of the plaintiff's accident he was running the car northward on the east track in Senate avenue, and the plaintiff (a lady) fell off the car at the place in Senate avenue described by the witness. The place described and its situations were afterwards exhibited to the jury by the defendant's map, and the east street car track marked "Citizens St. R. R." This map went to the jury bearing the guaranty of the defendant that it conveyed no evidence but the truth. It was prepared by the defendant's procurement, and exhibited to the jury for their enlightenment. Its introduction was at least a license to the jury to indulge the natural inference arising from every line, and figure, and word, and letter upon it. Every mark intentionally made upon the map had behind it a purpose. That purpose was rightly to guide the jury. The inference from the presence of the words is that they were placed there by the map maker to indicate the ownership of the railroad. If the purpose were otherwise, it should have been explained by the party introducing the map. What then shall be done with the words "Citizens St. R. R." printed upon the identical track, in the identical street, near the identical spot of the plaintiff's accident? Can it be said that the jury shall disregard them? If these words are to be eliminated from the map, then why shall not the map itself be eliminated from the evidence? By placing myself in the point of view occupied

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by the court and jury during the progress of the trial, and looking at the conduct of the defendant, and the character of the evidence, I am firmly impressed that the jury had before them sufficient evidence to justify the finding that the averments of the complaint were sustained.

I am unable to distinguish this case in principle from *Evansville, etc., R. Co. v. Snapp*, 61 Ind. 303; *Evansville, etc., R. Co. v. Smith*, 65 Ind. 92; *Wabash R. Co. v. Forshee*, 77 Ind. 158; and *Cincinnati, etc., R. Co. v. McDougall*, 108 Ind. 179. In the Snapp case it is said: "In the case at bar, there was no direct or positive evidence adduced upon the trial, that the appellant was the owner of, or operated, the railroad upon which the appellee's mare was run over and killed. The evidence showed that the mare was run over and killed on the Evansville and Crawfordsville Railroad. The appellant, the Evansville and Crawfordsville Railroad Company, was sued for the killing of said mare on its railroad, and appeared to, and was there before the jury defending, the action. There was not a particle of evidence adduced upon the trial tending to show that the railroad in question was owned or operated by any other person or corporation than the appellant; but it seems to have been assumed and taken for granted, as a fact about which no evidence was needed, that the railroad was owned and operated by the appellant at the time the appellee's mare was run over and killed thereon. Under such circumstances and the evidence on the trial, it seems to us that the jury trying the cause might have fairly and reasonably inferred and found that the appellant owned and operated the railroad in question at the time the appellee's mare was killed thereon; and especially so, in the absence of any evidence whatever from which it could possibly be inferred that such railroad was owned or operated by any other person or corporation than the appellant."

In the Forshee case, horse tracks were seen on the railroad, and the mare was found injured twenty-two feet from

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the south rail, and looked as if she had been hit with something. In respect to the evidence the court said: "The testimony hereinbefore set forth tends to show that the mare was killed upon the railway, and was struck by a locomotive, car or carriage, in operation thereupon, and this court will not question the sufficiency of such evidence, if the jury has been satisfied by it." And in the McDougall case is the following language: "The evidence was to the effect that the horse was injured upon the track of a railway which was known as the Cincinnati, Hamilton and Indianapolis railroad, a branch of the Cincinnati, Hamilton and Dayton railroad. *Prima facie*, this indicates a corporation of that name. It was sufficient to raise such an inference. The animal having been injured, as the proof showed, by a train run upon the track of that railroad, the appellant was presumptively liable for the injury."

 SCOTT v. EDGAR ET AL.

[No. 19,798. Filed April 2, 1902. Rehearing denied June 6, 1902.]

VENDOR AND PURCHASER.—*Vendor's Lien.*—Where a purchaser of real estate who had paid nothing thereon, conveyed the same to a third person upon the agreement of the parties that the first purchaser should be released from his liability on account of the purchase and the latter purchaser pay the consideration therefor, the transaction was the same in legal effect as if the first vendor had sold and conveyed the land to such third person, and he was entitled to a vendor's lien for the unpaid purchase money. pp. 39, 40.

SAME.—*Vendor's Lien.*—*Husband and Wife.*—Where a husband entered into an agreement with the owner of real estate for the purchase thereof and caused to be conveyed land owned by his wife in part payment therefor, gave his note for the balance of the purchase money and took the title of the real estate so purchased in the name of his wife, the wife being a party to the transaction, was bound, in the absence of fraud, to take notice of the terms and conditions upon which the conveyance of the land was made to her. pp. 40, 41.

SAME.—*Vendor's Lien.*—*Acceptance of Note of Vendor's Husband.*—*Waiver.*—The acceptance by a vendor of the note of the vendee's

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insolvent husband, payable in a bank in this State, for the balance of purchase money, did not amount to a waiver of a vendor's lien. pp. 41, 42.

From Rush Circuit Court; *D. A. Myers*, Judge.

Action by James R. Scott against Sarah Edgar and husband for the enforcement of a vendor's lien. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337j Burns 1901. *Reversed*.

S. L. Innis and *W. G. Morgan*, for appellant.

F. J. Hall, for appellees.

DOWLING, J.—This is an action upon a promissory note governed by the law merchant, and to enforce a vendor's lien upon land. The court sustained the demurrer of the appellee, Sarah Edgar, to the complaint, and rendered judgment against the plaintiff below. The ruling on the demurrer is the error assigned.

The material averments of the complaint are as follows: That on the — day of November, 1887, the defendant James P. Edgar, by his note, a copy of which is filed, marked A, promised to pay the plaintiff \$325 and attorney's fees; and that there is due and unpaid on said note \$450 as principal and interest, and \$35 as attorney's fees; that in September, 1886, the plaintiff conveyed by deed, to one John F. Peck, the real estate in Rush county, Indiana, bounded as follows (describing it); that no part of the consideration for such conveyance was paid, and that Peck was insolvent; that, afterwards, Peck and Edgar proposed to the plaintiff that, if the plaintiff would release Peck from his liability on account of the said purchase, Peck would convey said land to James P. Edgar, and that the said Edgar would assign to the plaintiff certain "sale notes," the face and actual value of which was \$1,500, and would also cause to be conveyed to the plaintiff seventeen and one-half acres of land owned by the defendant Sarah Edgar, the wife of the said James P., at an agreed valuation of \$1,050;

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and that the plaintiff accepted the said proposition; that, afterwards, James P. Edgar represented to the plaintiff that he had only \$1,175 of collectible notes, which he could turn over, but that, to make up the deficiency, he would execute his own note to the plaintiff for \$325, to which modification of the agreement of sale the plaintiff consented; that, at the request of the said James P. Edgar and Sarah Edgar, Peck and his wife then and there conveyed the premises so held by Peck to the said Sarah Edgar; that Edgar and his wife thereupon conveyed to the plaintiff the seventeen and one-half acres, as they had agreed to do, and that James P. Edgar executed to the plaintiff his note for \$325 for the deferred payment; that, at the time said note was executed, James P. Edgar was insolvent, ever since has remained so, and has never owned any property subject to execution. The complaint does not allege that the "sale notes" amounting to \$1,175 were turned over by James P. Edgar to the plaintiff, but it may be assumed that they were, in fact, so delivered. The appellant had been paid nothing by Peck, and the whole consideration for the conveyance to Mrs. Edgar, by the agreement of all the parties, was payable to him; so that the entire beneficial interest in the land was in him.

In legal effect, the transaction described in the complaint was the same as if the appellant himself had sold and conveyed the Peck land to Mrs. Edgar, and had taken the note of her husband for the unpaid balance of the purchase money. *Martin v. Cauble*, 72 Ind. 67; *Fleece v. O'Rear*, 83 Ind. 200; *Felton v. Smith*, 84 Ind. 485; *Bakes v. Gilbert*, 93 Ind. 70; *Upland v. Ginn*, 144 Ind. 434, 55 Am. St. 181; *Otis v. Gregory*, 111 Ind. 504; *Smith v. Mills*, 145 Ind. 334.

Mrs. Edgar was one of the parties to the transaction, and, in the absence of fraud, which is not asserted, she was bound to take notice of the terms and conditions upon which the conveyance of the land was made to her. *Humphrey v.*

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Thorn, 63 Ind. 296; *Pylant v. Reeves*, 53 Ala. 132, 25 Am. Rep. 605. As a part of the purchase money for the land conveyed to Mrs. Edgar remained unpaid, the appellant had a vendor's lien to secure the payment of such unpaid balance unless the lien was extinguished by his acceptance of the note of the insolvent husband payable at a bank in this State.

It is insisted by the appellee that the taking of the note of the husband of Mrs. Edgar operated as a payment of the balance of the purchase money for the land, and as a waiver of the vendor's lien. *Haskell v. Scott*, 56 Ind. 564; *Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256; *White v. Carlton*, 52 Ind. 371; *Alford v. Baker*, 53 Ind. 279; *Sutton v. Baldwin*, 146 Ind. 361; *Nixon v. Beard*, 111 Ind. 137; and *Teal v. Spangler*, 72 Ind. 380, are cited in support of the appellee's views.

These cases, with many others to the same effect, were considered in *Bradway v. Groenendyke*, 153 Ind. 509, in which it was held that *Smith v. Bettger*, *supra*, and *Teal v. Spangler*, *supra*, were, in effect, overruled by the decision in *Jouchert v. Johnson*, 108 Ind. 436. In the last named case, the court, by Mitchell, J., said: "The transaction is to be inspected in all its parts, and the intent of the parties, as discovered from all the circumstances, is to control in its interpretation. Thus it is uniformly held, that the presumption of payment, which ordinarily arises from the giving of a note governed by the law merchant, will be controlled when its effect would be to deprive the party who takes the note of a collateral security, or any other substantial benefit. In such cases the presumption of payment is rebutted by the circumstances of the transaction itself. 2 Daniel, Neg. Inst., §§1260, 1266b, 1267; 2 Jones, Mort., §924; *Reeder v. Nay*, 95 Ind. 164." See, also, *Bunker v. Barron*, 79 Me. 62, 8 Atl. 253, 1 Am. St. 282; *Cotton v. Atlas Nat. Bank*, 145 Mass. 43, 12 N. E. 850.

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Applying the rule here stated to the facts of this case, no presumption of payment arose from the giving of the note of James P. Edgar for the balance of the purchase money due to the appellant, for the reason that the effect of such presumption would be to deprive the appellant of the benefit of his lien on the land. It cannot reasonably be supposed that the parties to the transaction intended the giving of the note to have this effect.

Under the allegations of the complaint the appellant was entitled to the enforcement of his vendor's lien against the land conveyed to Mrs. Edgar, and the court erred in sustaining the demurrer to that pleading.

Judgment reversed, with instructions to the court to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

INDIANA POWER COMPANY *v.* ST. JOSEPH AND ELKHART POWER COMPANY.

[No. 19,522. Filed March 18, 1902. Rehearing denied June 6, 1902.]

EMINENT DOMAIN.—*Hydraulic Companies.*—*Waters and Water Courses.*—

A power company organized under §4827 *et seq.* Burns 1901, authorizing any company organized under its provision to appropriate land for such use, may, by filing with the clerk of the court an instrument of appropriation, as required by such statute, condemn and appropriate, under the right of eminent domain, lands owned and held by another power company as a mere private individual upon which the latter company was preparing to construct similar works but had failed to file appropriation proceedings as provided by statute. *pp. 43-50.*

SAME.—*Damages.*—*Hydraulic Companies.*—*Waters and Water Courses.*—

In a proceeding by a water company to appropriate land under §4827 *et seq.* Burns 1901, for the construction of its plant, the measure of damages for land taken from a similar company which had not complied with the statute so as to enable it to hold the land as against the power of eminent domain, given by such statute, is the value of the land taken; since no franchise had been acquired by the latter company. *pp. 50, 51.*

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APPEAL AND ERROR.—*Rehearing.*—*Waiver.*—Questions not presented on the original hearing will not be considered on a rehearing. pp. 51, 52.

From St. Joseph Circuit Court; *Lucius Hubbard*, Judge.

Proceedings by the St. Joseph & Elkhart Power Company to appropriate lands owned by the Indiana Power Company. From a judgment in favor of the former, the latter appeals. *Affirmed.*

F. Winter, A. L. Brick, D. D. Bates, F. F. Reed, W. L. Stonex and *C. C. Black*, for appellant.

C. W. Miller, J. Drake, A. Anderson, J. DuShane and *W. G. Crabill*, for appellee.

DOWLING, J.—Appeal by the Indiana Power Company from a judgment against it in a proceeding brought by the St. Joseph & Elkhart Power Company to appropriate certain lands claimed by the Indiana Power Company, and situated upon opposite banks of the St. Joseph river, in the county of St. Joseph. The proceedings were commenced by the appellee by filing instruments of appropriation in the office of the clerk of the St. Joseph Circuit Court under the provisions of the act for the incorporation of hydraulic companies. Acts 1865 (s. s.), p. 132, §4827 *et seq.* Burns 1901, §3696 *et seq.* R. S. 1881 and Horner 1901. Over the objections of the appellant, appraisers were appointed to assess the damages of the appellant, and afterwards made their report in writing. By answers and exceptions to the report, the appellant challenged the right of the appellee to appropriate its lands, and objected to the assessment of damages as too small. Many errors are assigned, but all of the questions necessary to be decided may be grouped under two principal heads. Had the St. Joseph & Elkhart Power Company the right to appropriate the lands of the Indiana Power Company, and was there error in the assessment of the damages?

Both corporations were organized under the statute for the incorporation of hydraulic companies. Acts 1865 (s. s.), p. 132, §§4827-4838 Burns 1901, §§3696-3707 R. S. 1881 and Horner 1901. The object of each company, as stated in its articles of association, was to construct or acquire a dam or dams across the St. Joseph river, in the counties of St. Joseph and Elkhart, with all necessary canals, pools, basins, etc., for the production and distribution of hydraulic power. The appellant, the Indiana Power Company, was incorporated December 14, 1899. Immediately upon its organization, and the election of its directors and officers, it accepted and adopted the preliminary surveys and plans made prior to its organization by its civil engineer. It also employed a civil engineer to make all further surveys, plans, and maps of the proposed site for its dam, and plans and specifications of all other work in connection therewith. December 14, 1899, the appellant contracted for land on which it expected to build the south end of its dam and canal, and afterwards, on March 10, 1900, purchased the same for \$300. On March 2, 1900, it marked off the ground on both sides of the river, herein sought to be appropriated, according to the plans for the construction of its proposed dam, etc., as then contemplated, by setting out stakes on lines corresponding with the civil engineer's surveys, plans, and maps at the points selected therefor, such staking out being done for the guidance of its workmen in making the expected excavations for the construction of said dam and canals, and for the erection of all necessary structures. March 5, 1900, the appellant purchased and became the owner of land on the north side of the St. Joseph river, on which to build the north end of its dam and canals, paying \$500 therefor. Prior to the commencement of these proceedings the Indiana Power Company had paid out for surveys, plans, specifications, etc., and for the purchase of lands herein sought to be appropriated, \$2,323.32. The lands so owned by the appellant, and described in the

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instrument of appropriation of the appellee, were sufficient in area for the construction of appellant's dam and abutments, power-houses, bulkheads, and wheel-pits, and for the completion of its dam with its connections, and consisted of five and fourteen-hundredths acres of land. The character of the St. Joseph river is such that only one dam can be constructed thereon in St. Joseph and Elkhart counties, between the cities of Mishawaka and Elkhart, in addition to the dams already built, and the proposed appropriation of the lands described in the instrument, filed therefor by the appellee, will entirely destroy the value of the said premises, and of the remaining lands of the appellant, as a site for the location and construction by the appellant of its proposed dam.

The appellee, the St. Joseph & Elkhart Power Company, was duly organized February 27, 1900, and proceeded at once to appoint its directors and to choose its other officers. On March 16, 1900, it filed in the office of the clerk of the St. Joseph Circuit Court its complaint and instrument of appropriation, for the purpose of condemning and appropriating one and ten-hundredths acres of land on the north side of the St. Joseph river, then owned by the said Indiana Power Company, and on the same date it filed its petition to appraise the damages which the Indiana Power Company would sustain by such appropriation. On the 19th day of March, 1900, the appellee filed its instrument of appropriation for two and eighty-four-hundredths acres on the south side of the St. Joseph river, owned by appellant, and, also, for an additional one and two-tenths acres on the north side of the St. Joseph river, in the tract then owned by appellant, and on the same day it filed its petition for the appointment of appraisers to assess the damages occasioned by the proposed appropriations.

The statute under which both the appellant and the appellee were organized authorizes any company incorporated under its provisions to appropriate lands for the purpose of

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constructing a dam across a river, for locks around such dam, for races and aqueducts to convey the water from such dam to a convenient place for its use as a power to propel machinery, and sufficient grounds, not exceeding ten acres, upon which to use said water-power for the purposes aforesaid. To carry out the objects of its organization, this statute requires that any company organized under it shall forthwith deposit with the clerk of the circuit court, or other court of record of the county where the land lies, a description of the rights and interests intended to be appropriated; and it declares that such lands, rights, and interests shall belong to such company, to use for the purposes specified in the act, by making or tendering payment as in said statute provided. It also states that the company may, by its directors, purchase any such lands or interest of the owner, and that on such agreement the owner shall convey the premises so purchased in fee simple, or otherwise, as the parties may agree, to such hydraulic company. The act further provides for the appointment by the circuit court or other court of record in the county where the land lies, or any judge thereof in vacation, upon the application of either party, of three disinterested freeholders of such county to appraise the damages which the owner may sustain by reason of such appropriation. Upon the return of the report of the appraisers, with their assessment of the damages, to the clerk of such court, setting forth the value of the property which they assess to the owners separately, and the filing and the recording thereof, such company is to pay to said clerk the amount thus assessed, or tender the same to the party in whose favor the damages are assessed; and on making payment or tender thereof, in the manner required, the act declares that it shall be lawful for such company to hold the interest in such lands so appropriated. No provision for the filing of a map of the lands intended to be appropriated, corresponding to the requirement of the general railroad

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act in that particular, is contained in the statute in question. But, upon a careful reading of §4834 Burns 1901, §3703 R. S. 1881 and Horner 1901, it would seem that the deposit with the clerk of the instrument of appropriation was intended by the act to constitute the notice to be given of the location of the dam, etc.

Where such instrument of appropriation is filed, and lands are acquired by virtue of such proceeding, it is said, by many of the courts, that the corporation takes such lands by grant from the State, and that by reason of the taking in this manner they are impressed with a public use. The title so acquired is not a fee simple, but an easement, and can be enjoyed under such grant only for the purposes contemplated by the statute. It is true that the same section expressly authorizes the purchase in fee simple of lands by the corporation for the purposes of its organization, but it will be observed that the lands which may be so acquired are those which are described in the instrument of appropriation. In nearly all the cases where the courts have been called upon to decide the question of priority in right between conflicting claims to lands to be used for corporate purposes, they have held that the company by which the *location* is first made has the superior right. The difficulty arises in determining what acts constitute such location.

It is said in Mills, Eminent Domain (2d ed.), §47, that "It does not signify that the articles of incorporation of one are prior in date to those of the other, or that one has made preliminary surveys over a particular route, or has made purchases of individuals along that route. Until the survey is made and *filed*, the company would hold the land purchased as any other individual landowner, and such land could be condemned by the rival company upon compensation. The priority of construction gives no rights where another company has perfected its location first." *Morris, etc., R. Co. v. Blair*, 9 N. J. Eq. 635; *Titusville, etc., R. Co. v. Warren, etc., R. Co.*, 4 Leg. Gaz. 117; *Chesa-*

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peake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & Johns. 1.

Again, it is said in Randolph, Eminent Domain, §183: "Where one has purchased property with the intention of putting it to public use, he cannot be divested of it by a party seeking to condemn it for a similar use. But the purchase, to be effective, must be consummated before a location is made under the eminent domain. Where a corporation duly filed a survey of property required, and another corporation afterwards recorded a deed from the owner, executed in pursuance of an unrecorded agreement made before the survey, priority was given to the first corporation, because it was not affected with notice of the agreement. * * * Where the conflict is between parties seeking to condemn, that one shall prevail who first makes a location in accordance with the statute." *Indianapolis St. R. Co. v. Citizens St. R. Co.*, 127 Ind. 369, 8 L. R. A. 539; *Rochester, etc., R. Co. v. New York, etc., R. Co.*, 110 N. Y. 128, 17 N. E. 680; *Pocantico Water Works v. Bird*, 130 N. Y. 249, 29 N. E. 246; *Denver, etc., R. Co. v. Alling*, 99 U. S. 463, 25 L. Ed. 438. And in Lewis, Eminent Domain (2d ed.), §306, pp. 753, 754, the general doctrine is thus stated: "As to what is such a completed location as to secure priority must depend largely upon local statutes. We should say, in general, that it includes everything necessary to perfect the right to proceed and condemn the property. * * * Where priority of right has been secured by priority of location, it can not be defeated by a rival company agreeing with the owners and purchasing the property."

The opinion of Shiras, Justice, in *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 27 Fed. 770, has been commended as a very clear and forcible statement of the principles applicable in cases of conflicting claims to priority: "It is certainly equitable that a company, which in good faith surveys and locates a line of railway, and pays the expense

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thereof, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right, and better equity. The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the state, and although the payment of the damages to the owner is a necessary prerequisite, the state may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected title to the easement. The owner cannot, by conveying the right of way to A, thereby prevent the state from granting the right to B. All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the state has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right."

The organization of appellant as a corporation, under the act for the incorporation of hydraulic companies, the recording of the articles of association, the selection of the site of the dam, the acquisition of the premises intended for the dam by deeds from the owners, did not, in our opinion, operate as a grant of those lands, or of any interest in them by the State to the corporation, nor impress upon them any public use. On the contrary, the appellant was at liberty to sell such lands in fee simple, to subdivide them, and to apply them to any private purpose whatever.

The sole connection of the State with the purposes of the appellant was its grant under the statute of the franchise of becoming a corporation, and exercising the powers conferred upon such corporation by the statute. But the appellant did not proceed further in the exercise of its statutory powers, nor in any way indicate its intention to devote

any lands to a public use. In the present case, as in many others, the question of priority of right is not free from difficulty, and in determining it we can not disregard the express language of the statute which declares that immediately after its organization "Such company shall forthwith deposit with the clerk of the circuit, or other court of record of the county where the land lies, a description of the rights and interests intended to be appropriated; and such lands, rights, and interests shall belong to such company to use for the purposes specified by making or tendering payment as hereinafter provided."

The appellee proceeded strictly according to the terms of the statute. The appellant held certain lands, but, as is stated in the authorities, it held them as a private individual might. Being so held, they were subject to the right of eminent domain, and could be appropriated by the State for the public use expressed in the instrument of appropriation filed by the appellee. Immediately upon the filing of that instrument, in the words of the statute, "they belonged to such company, to use for the purposes specified, by making or tendering payment as provided."

The remaining question as to the assessment of damages does not require extended discussion. The property held by the appellant, described in the instrument of appropriation of the appellee, was land only. No franchise of the appellee was appropriated, nor was any right taken from it. The point at which the dam was to be built was not the only place at which it could be constructed. In that respect this case differs from those relating to mountain passes, islands in a river, or other circumstances giving to the particular locality a peculiar value, no matter by whom owned or held. The appraisers could do nothing more than assess the value of the lands taken, and we think that all evidence touching the value of the premises as the site of a mill-dam was properly excluded. Under the circumstances set forth in the pleadings, and disclosed by the proof,

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the appellant had not acquired a perfected right to build a public dam at that place.

Numerous authorities are cited in the brief of the appellant, and all of them have received careful attention. We have found nothing in them, however, which authorizes such a construction of the statute of this State as would give to the appellant a prior right to build a dam at the point described in the instrument of appropriation, and in the pleadings in this cause. Nor do we find anything in them to sustain the claim of the appellant for compensation for anything more than the value of the land taken, considered independently of the inchoate design of the appellant to construct a dam there for hydraulic purposes.

Applying the views herein stated to the various questions involved in the assignment of errors, we are of the opinion that all of those questions were correctly decided by the trial court. Judgment affirmed.

ON PETITION FOR REHEARING.

DOWLING, C. J.—A very careful reëxamination of the points decided in this case has been made in connection with the briefs upon the petition for a rehearing. We have discovered no ground for any modification of the opinion heretofore announced.

It is indisputable that the appellant had the right to sell or otherwise dispose of the lands acquired by it by purchase, and to abandon its enterprise. It is equally evident that under the statute authorizing the organization of companies for hydraulic purposes, the only public and unequivocal act by which such companies are empowered to indicate their intention to devote lands to a corporate and public use is by filing their instrument of appropriation in the office of the clerk of the county where the lands are situated. In the case before us, while the appellant was a hydraulic company, and had purchased lands in the vicinity of the

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St. Joseph river, it had built no dam, nor had it begun the construction of such a work, further than to cause surveys to be made, plans to be prepared, and stakes to be set out for the guidance of its workmen.

The point is now made for the first time that the instruments of appropriation were insufficient because they failed to show the consent of the federal authorities to the construction of the proposed dam across the St. Joseph river, that river being a navigable stream. This point was not included in the original statement of points, nor referred to in the briefs on the hearing, and for that reason it can not be considered at this time. Rule 22. *Armstrong v. Hufty*, 156 Ind. 606, 630. Petition for a rehearing overruled.

CARTER v. BULLER ET AL.

[No. 19,850. Filed June 17, 1902.]

DRAINS.—*Account of Construction Commissioner.*—*Costs.*—A petition was filed by a party in interest reciting that the construction commissioner of a drain, established under §5622 *et seq.* Burns 1901, was about to accept the drain as completed, which in fact was incomplected, and such proceedings were had that a trial resulted, and thereafter by agreement of the parties, three civil engineers were appointed to examine the drain and make a report thereon. The report was such that the court found that the drain was not completed, and it ordered the commissioner to complete the same according to the specifications. After completing the drain he filed his account as construction commissioner claiming credit for disbursements made in carrying on the controversy over the completion of the ditch, including court costs and attorney's fees. *Held*, that the charges were properly disallowed. *pp.* 53-58.

SAME.—*Compensation of Commissioner.*—*Evidence.*—No error was committed in allowing a moiety of a drain commissioner's claim in the absence of any direct evidence that he did not serve the number of days for which he claimed compensation, where the facts showed that he claimed for more days than there were secular days embraced within the time the work was constructed *pp.* 58, 59.

From Grant Circuit Court; *W. H. Carroll*, Special Judge.

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In proceedings in the construction of a drain, certain items of the account of Solomon Carter, drain construction commissioner, were disallowed upon exceptions being filed thereto by B. F. Buller and others, and the former appeals. Transferred from Appellate Court, under §1837u Burns 1901. *Affirmed.*

J. A. Kersey and *A. E. Steele*, for appellant.

R. T. St. John and *W. H. Charles*, for appellees.

HADLEY, J.—Appellant filed his final report as constructing commissioner of a drain established under the provisions of the act of 1885, §5622 *et seq.* Burns 1901. Appellees, being interested landowners, filed exceptions to divers items claimed as credits, which exceptions were sustained to items four, five, six, seven, and eight.

The material facts are these: June 30, 1893, appellant was appointed construction commissioner, and in due time contracted the work to be performed according to plans and specifications. January 2, 1894, one Hancock, an interested party, filed in court his petition reciting that the commissioner was about to accept said ditch as completed, while in fact it was incomplete, and requested the court to appoint and send out an engineer to verify the work. January 16, 1894, upon appellant's motion, the court struck out Hancock's petition. On June 11, 1894, numerous other interested landowners filed a petition praying the court to grant an order against appellant to show cause why he did not, as commissioner, proceed to complete said drain in accordance with the plans and specifications. The order was issued, and on September 17, 1894, appellant appeared to the petition, and filed an answer thereto in two paragraphs: (1) A general denial, and (2) an argumentative denial. The completion of the drain being thus put in issue,—affirmed by appellant, and denied by the landowners,—was submitted to the court for trial. The contractor, whose duty it was to construct the drain according to the specifications, does not seem to have been made a party, or to have been brought

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into the case in any way. After hearing witnesses and other evidence *pro* and *con* for four days, the case was taken under advisement, and, at a subsequent term, to wit, December 12, 1895, "in accordance with the agreement of the parties herein" (the record recites), the court appointed three disinterested civil engineers, and ordered them, upon due examination, to report to the court without unnecessary delay whether said ditch was constructed in substantial compliance with the plans and specifications, and, if they found it was not, to report specifically the particulars wherein it was incomplete. December 23, 1895, the three engineers submitted their report, to the effect that "We have carefully surveyed and examined said ditch, and find that it has not been constructed in substantial compliance with the plans and specifications thereof," and setting forth that out of the total number of 238 stakes they found at 161 the ditch was too narrow by spaces running from one-tenth of a foot to six feet and a half, and that two trees were not removed as required by the specifications. Upon this report the court found that the drain was not completed, and on April 8, 1896, ordered appellant to proceed forthwith to complete the same in accordance with the report of said three engineers. The miscellaneous costs in the above mentioned trial were \$226, and the costs and charges allowed by the court to the three special engineers sent out to survey and report upon the condition of the work were \$125.25. February 3, 1897, appellant, upon order of the court to report, reported the completion of the ditch in accordance with the plans and specifications and the court's last order, whereupon the landowners objected to this report upon the ground that appellant had done nothing whatever to complete the ditch since the court's order of April, 1896, and that the same was still incomplete. And, upon being required by the court, appellant answered certain interrogatories propounded by the landowners with their last objections, in substance, as follows: Since April, 1896, there has been no excavation

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nor widening nor sloping of the banks of the ditch, for the reason that careful measurements were made by him (appellant) together with other persons fully competent to make such measurements, and the ditch was found to be its full width and depth as required by the plans and specifications, and that no trees had been removed, for the reason that there were no trees to remove as shown by the plans and specifications. Upon these answers the court sustained the objections to appellant's report, and the latter was again ordered to proceed forthwith to complete the ditch in accordance with the order of the court made in April, 1896. November 13, 1897, appellant again reported the completion of the ditch in accordance with the court's order of April, 1896. This report was accompanied by the verified certificate of Robert Thomas, deputy county surveyor, that the additional work required by the order of 1896 had been fully performed under his superintendence. This report was approved, and said ditch adjudged completed. Afterwards appellant filed his account as construction commissioner. Among other items for which he claims credit are the following: Item 15. Engineering done by Robert Thomas (alleged to have been for superintending additional work required), \$104. Item 18. Paid Steel & Kersey, attorneys (alleged to have been for professional services in the trials over the fact of completion of the drain), \$110. Item 23. Paid clerk costs (alleged to have been the miscellaneous costs accrued in the first trial of facts as to completion), \$226.60. Item 25. Paid the three engineers appointed by the court to resurvey and verify the work, \$129.25. Item 26. For 144 days employed by appellant in the construction of the work (\$3 per day), \$432.

The first four of these items were wholly disallowed, and the last disallowed for one-half of the amount. The action of the court upon these items presents the real question in the case. With respect to the first four items, they were for disbursements in carrying on the controversy that arose over

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the completion of the ditch. Was appellant justifiable in maintaining the controversy? He was appointed by the court to execute its order, and nothing more nor less. He was the court's instrument to construct for the landowners, who were required to pay the cost, such a ditch as they requested and the court had ordered. He had no authority whatever to depart from the specific depths and dimensions prescribed in the report of the locating commissioners. He stood for the landowners in contracting and in superintending the work, and it was his plain duty to see that the contractor performed his agreement, and constructed the drain according to the plans and specifications, which formed the basis of the contract. In short, his relation to the enterprise was such as would not permit him, at the expense of the ditch fund, to assert any fact or interest adverse to the rights of those he represented. When, therefore, the landowners made plausible complaint that the ditch was not so constructed, appellant, before acceptance, should have had the same examined and reported upon by a competent and disinterested engineer, or taken such other steps as would have reliably proved the true state of the work. Appellant, however, without the slightest effort (appearing from the record) to test the work, or to inquire into the grounds for complaint as he should have done, took up the battle of the contractor against the complaining landowners, went into court, joined issue with the complainants, and challenged them to prove that the ditch was not completed according to the specifications. Appellant's attitude drove the landowners into a choice between two alternatives. They could assent to the acceptance of the incompleted ditch, and thus be content with less than they had paid for, or undertake to establish its incompleteness before the court. The contest thus provoked was between the complainants and appellant as an individual. As a trustee for the landowners he could not employ the trust funds in maintaining, on behalf of a stranger, a right adverse to the beneficiaries of

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the fund. In thus assuming to act as a volunteer for the contractor he subjected himself to the usual rule for the taxation of costs.

The obstinacy of appellant is unaccountable. It appears that ten months after the court had adjudged the ditch incomplete, and had ordered him to proceed without unnecessary delay to complete it in accordance with the report of the three special engineers, appellant, upon order of the court to show cause, reported that the drain was completed in accordance with the order and plans and specifications, and, at the same time, in his answer to interrogatories, admitted that no work had been done on the ditch since the court's order, for the reason that upon a careful examination by himself and others it was found that the ditch already met all the requirements of the plans and specifications. And, furthermore, upon the court's peremptory rule to proceed forthwith to comply with the order of the court, he, upon his own motion, and without the advice or approval of the court, employed the county surveyor to take charge and superintendence of the additional work required, and paid him therefor \$104, being \$4 per day for twenty-six days' work.

Appellant had no authority under the law (§5626 Burns 1901) to pay any of the items in controversy here until the claim therefor had first been presented to and allowed by the court. His failure first to procure the approval of the court left the propriety of the payment an open question to be decided when credit therefor was claimed.

As to item fifteen, being for amount paid the county surveyor for services in superintending additional work required, the expenditure can only be justified upon the ground that that amount of skilled labor was reasonably necessary to the proper execution of the work. Whether or not it was necessary was a question of fact to be determined from the evidence, and, the court having found against the

allowance, we must presume that the surveyor's services, in that particular, were uncalled for.

The court was clearly right in disallowing items eighteen, twenty-three, and twenty-five. Whatever sums appellant paid to attorneys, or expended as costs, or caused others to expend in his strange effort to prevent the landowners from enforcing a proper construction of the drain, were not chargeable against the ditch assessments. The allowance of the claim for costs is urged for the reason that no judgment for costs was rendered against appellant. It is a sufficient answer to say, neither was there a judgment for costs rendered against the drainage fund. The costs were simply taxed in the proceeding by the clerk, without judgment against any one, and were paid by appellant, without any action of the court authorizing him to do so.

It is also insisted that item twenty-five, being for amount paid the three special engineers appointed by the court, should have been allowed, because the engineers were appointed by the court, and their claims approved before payment. This prior approval by the court does not alter the case in this instance. The claim was disallowed, not because the services were needless, nor because the amount paid was unreasonable, but because the appointment and expenditure were, by the unwarranted conduct of appellant, made necessary to enable the court correctly to determine the controversy precipitated by him. Whether the parties did, or not, agree to the appointment is of no consequence. The court made the appointment as it had the right to do with or without an agreement. It can not be doubted that the court had power, as it has in all doubtful cases, to take such reasonable steps as will bring accessible, trustworthy evidence before it, and adjudge the cost thereof as an incident of the trial.

With respect to item twenty-six, it is contended that the court erred in reducing appellant's service claim from 144 to seventy-two days; the argument being that since all the

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evidence given touching said service was submitted by appellant in person, and which was all direct and positive, that he actually rendered 144 days of necessary service in the construction of the ditch, the court had no legal right, under the evidence, to make an allowance for a moiety only; that the evidence established the whole claim with the same force that it established a part, and the finding was therefore arbitrary and unwarranted. We are unable to agree to this proposition. The court was not bound to accept the statements of appellant as absolutely true, though a credible witness, and uncontradicted, except by inferences arising from the facts and circumstances before the court, which attended and were associated with the facts related. Among other things, it appears that, within six months after the ditch was assigned to appellant for construction, a landowner represented to the court that he (appellant) was about to accept it from the contractor in an incomplete condition. From this we may infer—assuming that he contracted the construction at the expiration of the fourteen days' notice required by the statute—that the work was chiefly performed within 166 days. Deducting therefrom twenty-five Sundays, and we find that appellant claimed for more days' service than there were secular days employed in executing the body of the drain. It could hardly have been necessary for him to have been upon the work every day of its progress, and after making reasonable allowance for the time spent in collecting assessments, and in attending court for purposes properly connected with the duties of his office, we are unable to say that it clearly appears that the allowance made by the court was for a less amount than it should have been. We can not therefore disturb it.

There are other questions presented, relating to the admission and exclusion of evidence, that we have not considered for the reason that they are of such minor importance as would not, if erroneous, warrant a reversal of the judgment, which is plainly right upon the merits.

Judgment affirmed.

159	60
167	329

CLARK v. THE STATE.

[No. 19,808. Filed June 18, 1902.]

CRIMINAL LAW.—*Self-defense. — Reasonable Doubt. — Instructions.*—In a prosecution for an assault and battery with felonious intent, in which the defendant sought to justify his act on the ground of self-defense, the court erred in instructing the jury to the effect that defendant was required to establish such defense beyond a reasonable doubt; since it is the duty of the jury in such case if the evidence raises a reasonable doubt in their minds as to whether any material fact favorable to such defense has been proved to give the defendant the benefit of the doubt and find the fact in question in his favor. *pp. 60-67.*

TRIAL.—*Instructions. — General and Specific.*—Although instructions must be considered as a whole, general instructions given can not cure error committed in giving a specific instruction. *p. 66.*

From Hancock Circuit Court; *E. W. Felt*, Judge.

Noah M. Clark was convicted of an assault and battery with intent to commit murder in the second degree, and he appeals. *Reversed.*

E. Marsh and *W. W. Cook*, for appellant.

W. L. Taylor, Attorney-General, *C. C. Hadley*, *Merrill Moores*, *Binford & Walker*, *Barrett & Wiggins* and *A. C. Vanduy*n, for State.

JORDAN, J.—Appellant was indicted for an assault and battery upon one William Reed with the felonious intent to commit murder in the first degree. On a trial before a jury, he was convicted of an assault and battery with the intent to commit murder in the second degree, and over his motion for a new trial, was sentenced to be imprisoned in the reformatory prison at Jeffersonville for an indeterminate period of from two to fourteen years, and to pay a fine of \$5, together with all costs. From this judgment he appeals. On the trial, appellant justified his act of committing the assault and battery in controversy upon the prosecuting witness on the ground of self-defense. The errors assigned and discussed by his counsel relate (1) to the giving

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of certain instructions to the jury; (2) misconduct of the State's attorney in his argument to the jury; and (3) error of the court in refusing a new trial on newly discovered evidence.

There is in the record evidence to prove that appellant and Reed, the prosecuting witness, both resided in the town of Fortville, in Hancock county, Indiana, and on a certain night in August, 1901, Reed and appellant were around the saloons of that town, appellant spending the greater portion of the evening in the saloon of Chapple & Crist, and, on this saloon being closed at eleven p. m., he left and went out on the street, and in a short time thereafter he, in company with some others, walked up to where Reed was standing and handed him a handkerchief which he said belonged to one of Reed's brothers. A controversy then appears to have arisen between the parties in respect to a fight which appellant had with Reed's brother some seven or eight years in the past. Reed seems to have controverted the claim of appellant that he had whipped the former's brother in that fight, and each appears to have charged the other with being a liar. Thereupon they clinched each other and engaged in a fight. In the struggle they both fell to the ground, appellant falling on top of Reed. Thereupon the latter drew a razor, which he had concealed about his person, and began to cut appellant. He cut him in the arm, and also cut his coat in several places. The parties were then separated by bystanders. After they were separated it is shown that appellant was bleeding profusely from the cut in his arm, and more opprobrious language passed between the parties. Appellant, as disclosed, after he got up threw some stones at Reed, one of which struck him on the head, and he also fired a revolver which he had. In justification of his shooting on this occasion he claimed, upon the trial, that Reed, after they had been separated, rushed towards him, and that he told him to stand back, and thereupon fired his revolver over Reed's head in order to frighten him. Reed

then left and went down to Dr. Stewart's office for the alleged purpose of having his head dressed by the doctor. The office was closed, and he was directed to wait until the doctor could come to the office. Reed, then, it appears, went and stood near the mouth of an alley opposite Dr. Stewart's office. He claimed on the trial, when testifying, that he was standing there waiting for the doctor to come and open the office. Some time after Reed started to the doctor's office, after the first encounter, which it appears occurred between eleven and twelve o'clock at night, appellant, according to his own version and testimony in respect to the matter, started to go home; that his arm, by reason of the cut which Reed had inflicted with his razor, was bleeding profusely, and that he was much excited, and, as he was passing down the street on his way home, when he reached the point where Reed was standing near the mouth of the alley, the latter came at him, and threw a brick which struck him on the shoulder. Reed, then, as appellant claims, ran towards him, and began to strike at him with a razor or knife which he had in his hand, and succeeded in cutting several gashes in his clothes, cutting him across the arm of the coat; that after Reed struck him with the brick, and after cutting his clothes with a razor as stated, Reed ran out to a point ten feet near the mouth of the alley, and stooped down to pick up a brick or stone, and appellant, believing that he was about to be assaulted again by Reed with a brick, drew his revolver and fired, the shot taking effect in the region of Reed's hip. The evidence of the latter given upon the trial is in sharp conflict with appellant's statements and version of the assault or affair in the alley. The State claimed, and introduced evidence in support of its claim, to the effect, that after Reed and appellant had been separated at the time of their first fight, and after the former had started for the doctor's office, appellant followed Reed, overtaking him at the alley in question; that Reed heard appellant coming after him and thereupon picked up a brick and threw

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it at him. Reed stated that he did not know whether the brick hit appellant or not; that, after he threw the brick, he testified that he started and ran towards the doctor's office, and when about ten or fifteen feet away from appellant, the latter shot at him with his revolver, the ball hitting him near the hip.

The trial judge in his charge to the jury, after giving some general instructions and one special instruction relating to the law of self-defense, gave the following instruction in respect to the claim of appellant, that, under the facts, his act of shooting the prosecuting witness was justified on the ground of self-defense: "If, however, you believe from the evidence, beyond a reasonable doubt, that the prosecuting witness, at the mouth of the alley, or near thereto, threw a brick at or against the defendant, or otherwise assaulted him, and immediately thereupon turned and fled from the defendant, and that, while so fleeing, the defendant, not reasonably apprehending death or great bodily harm, shot the prosecuting witness, Reed, such shooting would not be justifiable, and you would be warranted in finding the defendant guilty, as charged in the indictment."

Counsel for appellant vigorously assail and condemn this charge because, as they assert, it is misleading, and that the effect thereof was to advise the jury that the law cast the burden upon the defendant of satisfying them by evidence, beyond a reasonable doubt, that he properly exercised his right of self-defense. In other words, counsel contend that the court, under this instruction, in effect, informed the jury that if they found beyond a reasonable doubt that the prosecuting witness, at or near the mouth of the alley in question, assaulted the defendant with a brick, or if they believed, beyond a reasonable doubt, that he otherwise assaulted the defendant, and found the other facts therein stated to be true beyond a reasonable doubt, they would be warranted in finding the defendant guilty as charged in the indictment. The contention is advanced, that the de-

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fendant was not required to establish beyond a reasonable doubt any of the facts relating to the defense which he had interposed in justification of his action, but if the evidence in the case created or raised in the minds of the jurors a reasonable doubt as to whether he had lawfully exercised his right of self-defense, then, and in such event, he was entitled to be acquitted. While the State was required to establish beyond a reasonable doubt the guilt of the defendant, nevertheless it was not incumbent upon the latter to satisfy the jury beyond a reasonable doubt that any of the facts upon which he based his defense were proved. If the evidence raised a reasonable doubt in the minds of the jurors as to whether any material fact favorable to the defense of the accused had been proved, it would in that event be their duty to give him the benefit of such doubt, and find the fact in question in his favor. *Wade v. State*, 71 Ind. 535-540; *Plummer v. State*, 135 Ind. 308; *Trogdon v. State*, 133 Ind. 1; *Hinshaw v. State*, 147 Ind. 334-384.

The case of *Plummer v. State*, *supra*, was a charge of murder. The lower court in the course of instructions advised the jury that if they found certain facts to be true, then they should find the defendant guilty, unless they found beyond a reasonable doubt (1) that the shooting was justifiable on the ground of self-defense, (2) or unless they found beyond a reasonable doubt that the defendant, at the time, was of unsound mind. This charge was held to be erroneous, the court saying: "As long as there is a reasonable doubt of the sanity of a defendant in a criminal case, at the time of the commission of the alleged offense, there must necessarily be a reasonable doubt of his guilt; and as long as there is a reasonable doubt whether the homicide was not committed in the reasonable exercise of the right of self-defense there is also a reasonable doubt of the guilt of the accused. The instructions in question required the defendant to prove his innocence in that respect beyond a reasonable doubt."

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The rule is well settled in this State, under our criminal procedure, that if the evidence, whether produced by the State or by the accused, leaves a reasonable doubt in the minds of the jury in regard to his guilt, he is entitled to an acquittal. In *Trogdon v. State*, 133 Ind. 1, the charge was murder. The defendant relied upon self-defense in justification of the homicide. The trial court, as disclosed, advised the jury fully relative to the law of self-defense, not only generally but also specifically, applying the principles of the law to the particular facts as they were claimed to exist by the State and the accused respectively. By instruction nineteen given to the jury in that case, the court summarized the facts which the defense claimed had been shown in justification of the homicide. The instruction was prefaced by the following statement: "Upon the other hand if you are satisfied from the evidence in the case that," etc., the instruction concluding, "then I instruct you that the defendant acted in self-defense even though the shooting resulted fatally to the decedent, and you should in that event find him not guilty." This instruction, on appeal in that case, was condemned as erroneous, and the judgment of conviction, by reason of the error, was reversed. This court in that case said: "It is true that the defense was affirmative in its character. It admitted the homicide, but insisted that it was justifiable. The defendant was not required, however, to satisfy the jury that it was justifiable. It was enough if the evidence upon that branch of the case raised in the minds of the jury a reasonable doubt. The instruction imposed upon the accused an undue burden. The jury should have been instructed that if, from the evidence, there was reasonable doubt whether or not the homicide was committed under the circumstances claimed by the accused he should be acquitted. The court had previously instructed the jury as to the presumption of innocence with which the law clothed the accused, the degree of proof re-

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quired to convict, and as to the rule of reasonable doubt. These instructions covered the ground fully, and were accurate and unexceptionable. They were, however, general in their character. While it is true that instructions must be considered as a whole, and that it is sufficient, if taken together, they state the law correctly, the general instructions given can not cure the error committed in giving the specific instruction. The inevitable tendency of the instruction given would be to lead the jury to understand that, as applied to the affirmative defense, the burden shifted, and that while the State must satisfy them of the fact of the homicide by evidence, and beyond a reasonable doubt, the defendant was in turn required to satisfy them, by some degree of proof, that it was justifiable."

The rule enforced in the Trogdon case must control in this. In criminal prosecutions where the defense was an *alibi* the rule has been frequently affirmed by this court that if the evidence relating thereto created a reasonable doubt of the guilt of the accused, he should be acquitted. *Adams v. State*, 42 Ind. 373; *Binns v. State*, 46 Ind. 311; *Kaufman v. State*, 49 Ind. 248; *French v. State*, 12 Ind. 670, 74 Am. Dec. 229.

The claim of appellant, under the evidence, was that Reed, when near the mouth of the alley in controversy, assaulted him with a brick and razor. The assault and battery so perpetrated by Reed upon appellant was one of the essential or material facts in the latter's defense of justification. It was the very base of his defense, and certainly was such a material fact, which, if upon a consideration of all the evidence relating thereto a reasonable doubt was thereby raised in the minds of the jury as to its existence, then, in that event, the jury was required under the law to find thereon in favor of the accused. *Trogdon v. State*, 133 Ind. 1; *Plummer v. State*, 135 Ind. 308. Neither was it essential that the jury, under the evidence, should believe beyond a reasonable doubt that appellant apprehended death

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or great bodily harm, under the circumstances, when he fired the shot in question. As to this material fact in his defense, if the evidence created a reasonable doubt in regard to its existence, then the finding of the jury thereon should also have been in his favor. Considered in any light the charge may be said to be misleading. The State was the only party upon whom it was incumbent to prove any material fact beyond a reasonable doubt. It was not required to prove that the prosecuting witness assaulted the defendant with a brick, "or otherwise assaulted him," or to prove any facts in support of the defendant's defense, hence the rule of requiring that the proof must be beyond a reasonable doubt could properly have no application so far as this particular instruction was concerned. In truth, the only application, under the circumstances, that the jury could make of the instruction was that the court thereby intended to advise them that the defendant was required to prove the assault upon him by Reed, and other facts stated in the charge beyond a reasonable doubt. If an instruction, when considered in connection with others in the case, tends to leave the jury in doubt and uncertainty as to what is the law applicable to the case presented for their consideration, the judgment under such circumstances must be reversed. *Kirland v. State*, 43 Ind. 146, 13 Am. Rep. 386; *State v. Sutton*, 99 Ind. 300.

We conclude, for the reasons herein stated, that the court erred in giving the instruction in dispute, for which error the judgment must be reversed. The other alleged errors argued by counsel may not arise again upon another trial, therefore, we pass them without consideration.

The judgment is reversed, and the cause remanded to the lower court, with instructions to grant appellant a new trial. The clerk will issue the necessary warrant for the return of the prisoner to the sheriff of Hancock county.

City of Logansport v. Kihm.

THE CITY OF LOGANSPORT v. KIHM.

[No. 19,840. Filed June 19, 1902.]

PLEADING.—*Personal Injuries.*—*Cities.*—*Defect in Street.*—A complaint in an action against a city for personal injuries sustained by plaintiff while riding a bicycle because of a defect in an improved street, described as a hole four inches in depth, two feet in width, and three feet long, which alleges that while plaintiff was riding her bicycle she approached said street so out of repair and by reason of said street being out of repair, defective, and unsafe, she was thrown from her bicycle and injured, is insufficient as against a demurrer, where it was not alleged that the wheel came in contact with the defect, or how or in what manner the accident was caused by the defect. *pp. 68-71.*

SAME.—*Personal Injuries.*—*Cities.*—*Defect in Street.*—A complaint against a city for injuries to plaintiff while riding a bicycle on a street, which alleges that the street was dangerous to persons riding bicycles, because of its steep slope or grade from its middle line to the curbing is insufficient against demurrer, where it does not appear that the bicycle slipped or became unmanageable in consequence of the abruptness of the slope, or that the nature of the grade of the street caused or contributed to the accident. *pp. 71, 72.*

From White Circuit Court; *T. F. Palmer*, Judge.

Action by Katie Kihm against the city of Logansport for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

F. M. Kistler, S. T. McConnell and *A. J. Jenkins*, for appellant.

F. W. Funk, E. B. Sellers and *W. E. Uhl*, for appellee.

DOWLING, C. J.—The appellee recovered a judgment against the appellant for damages for an injury by a fall from a bicycle, alleged to have been occasioned by a defect in an improved street in the city of Logansport, in this State. The sufficiency of each of the two paragraphs of the complaint was questioned by demurrers for want of facts. The ground of objection to the

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164	191
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first paragraph is that it is not shown by proper averment that the injury was caused by the defect in the street, and to the second that it fails to state wherein the grade of the street on which the accident occurred was improper. The point made against the first paragraph seems to be well taken. It is averred that the street was paved with brick, and that the appellant had negligently suffered it to get out of repair and to become worn by travel and sunken at a certain point so that a hole had formed four inches in depth, two feet in width, and three feet long, three sides of such hole sloping outward, and the east end thereof being nearly perpendicular. It is then alleged "That, while she [appellee] was riding her bicycle, as aforesaid, upon said street, *she approached the said street, so out of repair as aforesaid, from the west end, traveling toward the east, using care and caution, and having full control of her wheel while so doing, and traveling at a reasonable rate of speed; that while so traveling as aforesaid, using care and caution, and having no knowledge of the defect in said street, as aforesaid, and not seeing the same, and, on account of the character of the defect, it was such that it could not be seen in time to avoid her injury hereinafter set out, she, riding her wheel as aforesaid, struck said defective, unsafe, and out-of-repair street, and, by reason of said street being out of repair, as aforesaid, defective, and unsafe, she was thrown violently from her bicycle upon the brick pavement of said street, etc.*" It does not appear that the appellee "struck" the street at or near the defective part thereof, nor that her bicycle struck the dangerous cavity, nor that it ran into or across the hole, nor that the hole in the street had any connection whatever with the accident. The appellee "struck" the defective street when she entered it, as she alleges, at some point near its west end; but it is not shown where she came upon it, nor how far from the hole described in the pleading. The street may have been half a mile, or a mile, or more, in length. The averment "that, by reason of the street being

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out of repair, she was thrown from her bicycle" leaves the cause of the accident entirely to conjecture. Was she attempting to guide her bicycle around the obstruction? Or did she stop it suddenly to avoid running into it? Did she ride into the defective place in the street, and did the fall or obstruction cause the bicycle to turn over? Or did she attempt to leap from the wheel when she found she could not steer it around the dangerous spot? None of these questions is answered by the first paragraph of the complaint. While the paragraph describes a specific defect in the street, and alleges that the accident occurred by reason of that defect, it wholly fails to show that the defect in the street was the proximate cause of the accident and injury, or how or in what manner the accident was occasioned by it.

It is said in *City of Connersville v. Connersville, etc., Co.*, 86 Ind. 235, 236, that "Uncertainty is not, as a general rule, cause of demurrer; but there are cases where the pleading is so vague as not to state a cause of action or ground of defense, and, in such cases, a demurrer will lie. *Lewis v. Edwards*, 44 Ind. 333; *Lane v. Miller*, 27 Ind. 534; *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370. * * * While the rule in favor of pleadings assailed by demurrer on the ground of uncertainty is a liberal one, it does not, by any means, go to the extent of dispensing with reasonable certainty. This the rule could not do without contravening the express provisions of the code and subverting settled principles of law."

The rule at common law is thus stated in 1 Chitty, Pleading (7th Eng. ed.), 256: "The principal rule, as to the mode of stating the facts, is, that they must be set forth with *certainty*; by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defense, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and the court who are to give judgment." This rule has been subsequently in-

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incorporated in the civil code of this State. §341 Burns 1901, §338 R. S. 1881.

The case of *Corporation of Bluffton v. Mathews*, 92 Ind. 213, states the rule thus: "To render the appellant liable it was necessary to show in the complaint, by the averment of issuable facts, a wrong on the part of the appellant and damage to the appellee, and that the wrong was the proximate cause of the damage. The complaint did not show that when the appellee was injured the appellant was chargeable with fault, or that her injury was caused by the appellant's wrongful act or omission."

In *Pittsburgh, etc., R. Co. v. Conn*, 104 Ind. 64, 68, it is said: "It is not enough, in such a case as this, to charge the defendant with negligent acts, whether of commission or omission; but it must also be shown, with reasonable certainty, that such acts were the direct or proximate cause of the accident or injury, or the complaint must be held bad on demurrer for the want of sufficient facts." See, also, *Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Enochs v. Pittsburgh, etc., R. Co.*, 145 Ind. 635; 16 Am. & Eng. Ency. Law, 428, 431; 14 Ency. Pl. & Pr., 336.

The allegation "that by reason of said street being out of repair as aforesaid, defective, and unsafe, she was thrown violently from her bicycle," is a conclusion of the pleader. The facts stated do not justify the inference made from them. *City of Logansport v. La Rose*, 99 Ind. 117, 128; *Jackson School Tp. v. Farlow*, 75 Ind. 118, 120; *Boyd v. Olvey*, 82 Ind. 294, 296, 297; *Krug v. Davis*, 85 Ind. 309, 311.

The second paragraph of the complaint contains all of the averments of the first, with the further allegation that the grade of the street from its crown to the curbing on each side was so steep and great as to be dangerous to persons riding bicycles, and that it had been in this state for a considerable time, as the appellant and its officers knew, but

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that the appellee was ignorant of its condition. The fact that the street was dangerous to persons riding bicycles, because of its steep slope or grade from its middle line to the curbing, is probably averred with sufficient certainty; but it does not appear that the bicycle slipped or became unmanageable in consequence of the abruptness of the slope, or that the nature of the grade of the street caused or contributed to the accident. This paragraph in its description of the accident is quite as indefinite as the first. In almost the same words it alleges that the appellee "struck the defective * * * street" somewhere west of the hole, "and by reason of the said dangerous and unsafe grade of said street, and being out of repair, as aforesaid, she was thrown violently from her bicycle," etc. The fault of this paragraph like that of the first is not mere uncertainty. It fails to connect the alleged negligence of the appellant with the injury sustained by the appellee. Such connection between the condition of the street and the accident to the appellee not being shown, the paragraph does not state a cause of action against the appellant.

Other errors are assigned and discussed, but it is not necessary to consider them.

Judgment reversed, with instructions to the court to sustain the demurrer to each paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

**THE CHICAGO AND SOUTHEASTERN RAILWAY
COMPANY v. KENNEY ET AL.**

[No. 19,592. Filed November 26, 1901. Rehearing denied
June 19, 1902.]

COURTS.—*Appointment of Receiver.*—*Jurisdiction.*—*Railroads.*—*Corporations.*—Where the court had jurisdiction of the person of the defendant, the judge of the court, at chambers, in vacation, likewise possessed *R.* p. 76.

CORPORATIONS.—*Railroads.*—*Appointment of Receiver.*—*Jurisdiction of Court.*—Under the act of 1899 (Acts 1899, p. 18) providing that any action against any corporation organized under the law of

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this State may be brought in any county where such corporation has an office or agency for the transaction of business, the court of a county in which a railroad organized in this State has an office or agency has jurisdiction of an action for the appointment of a receiver of such railroad company although the principal office of the company is in another county in this State. *p. 76.*

RECEIVERS.—*Jurisdiction.*—*Appearance.*—*Railroads.*—Where in an application for the appointment of a receiver the defendant entered a special appearance objecting to the jurisdiction of the court and filed a motion for the postponement of the hearing accompanied by an offer to pay into court a sum of money in discharge of certain claims admitted to be just, and submitted affidavits upon the question of the appointment of a receiver, the motion amounted to a demurrer and operated as a full appearance to the action and as a waiver of all objections to the jurisdiction of the court over its person. *pp. 76, 77.*

SAME.—*Jurisdiction.*—*Joint Action.*—An objection to the jurisdiction of the court over the subject-matter of an action for the appointment of a receiver for a railroad company, on the ground that no joint cause of action in the several plaintiffs was stated, is not well taken, since a common interest in the relief sought authorizes the joinder of several plaintiffs, although in other respects their interests are separate and distinct. *p. 77.*

APPEAL AND ERROR.—*Receivers.*—On appeal from an interlocutory order appointing a receiver, the insufficiency of the facts stated in the complaint, including the improper joinder of parties plaintiff, will be disregarded, except so far as it relates to the appointment prayed for. *pp. 77, 78.*

RECEIVERS.—*Appointment.*—*Cause.*—It is not necessary that a party applying for a receiver should first exhaust his remedies at law, but it is sufficient if it appears that such remedies are inadequate, or would be ineffectual, or that the appointment of a receiver is necessary to preserve the property or to secure justice to the party. *p. 78.*

SAME.—*Appointment.*—*Complaint.*—A complaint against a corporation for the appointment of a receiver is not defective because it does not set out specifically the facts from which the insolvency of the corporation could be inferred; the charge of insolvency in the language of the statute is sufficient. *pp. 78, 79.*

SAME.—*Creditor Not Required to Reduce Claim to Judgment.*—A creditor is not required to reduce his claim to judgment before asking for the appointment of a receiver. *p. 79.*

SAME.—*Appointment.*—*Insolvency.*—*Evidence.*—The action of the court in appointing a receiver for a railroad company on the application of creditors will not be reversed on the insufficiency of the evidence, where there was evidence that the judgments and other claims of some of the petitioners had long been due and unpaid,

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and that defendant, while admitting their justice and validity, persistently refused to pay them; that the property of defendant was encumbered by mortgages to its full value, and that it owed large sums in addition to its mortgage debts; that it owned no rolling stock nor rails, and that for more than three years past it had been unable to pay its employees. *pp. 79-81.*

RECEIVERS.—Appointment.—In an application for the appointment of a receiver no error was committed in overruling a motion to postpone the proceeding until defendant could investigate some of the claims set out in the complaint, since the decision of the court as to such claims was interlocutory only, and not final, their validity being subject to full investigation and proof upon the final hearing. *pp. 81, 82.*

From Clay Circuit Court; *P. O. Colliver*, Judge.

From an interlocutory order appointing a receiver for the Chicago and Southeastern Railroad Company, on the application of Charles Kenney and others, defendant appeals. *Affirmed.*

W. R. Crawford and *U. C. Stover*, for appellant.

A. H. Ratcliffe, *S. D. Coffey*, *S. M. McGregor*, *G. A. Knight* and *A. W. Knight*, for appellees.

DOWLING, J.—In this action, Charles Kenney and thirteen others holding claims against the Chicago and Southeastern Railway Company ask the appointment of a receiver for that corporation, the sale of its property, and the equitable distribution of the proceeds of such sale among the creditors. This appeal is from an interlocutory order appointing a receiver.

The appellant is a railway corporation, organized under the laws of this State, and is operating a railroad between the cities of Anderson and Brazil; for the transaction of its business, it maintains two offices in Clay county, Indiana, located, respectively, at Cambon and Brazil; four of the appellees hold judgments against the appellant, which were rendered by the Putnam Circuit Court, in this State; three of them have claims for injuries to stock; five assert claims for damages due them for rights of way appropriated by the appellant in the counties of Montgomery and Parke; two hold judgments recovered before a justice of the peace

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of Parke county; and one sets up a claim on an account against the appellant. All of these claims are alleged to be due and unpaid. The appellant refuses to pay them, and it is, as the appellees are informed, insolvent, or in imminent danger of insolvency. These facts are set out in the complaint, which asks that the amount due to each appellee be ascertained by the court, and that a receiver of the property and effects of the appellant be appointed. The complaint was verified.

Notice having been served on the appellant on February 11, 1901, that on February 16, 1901, an application for the appointment of a receiver would be made by the appellees to the judge of the Clay Circuit Court, at chambers, in vacation, the appellant entered a special appearance at the hearing, and objected to the jurisdiction of the court on account of the alleged insufficiency of the complaint. The objections were overruled. A motion was then filed on behalf of the appellant for a postponement of the hearing for one week to enable it to obtain record and other evidence of the invalidity of certain of the claims set out in the complaint. The motion, which was under oath, was accompanied by an offer to pay into court the sum of \$1,500 in discharge of such of the claims as were admitted to be just, or to execute a bond in that amount to secure their payment. The motion was denied. The application for the appointment of a receiver was submitted upon affidavits filed by the parties respectively. At the close of the evidence, the appellant renewed its motion for a postponement of the hearing, and tendered a bond in a penalty of \$1,800 to secure the payment of such claims as should be found to be valid. This motion, also, was overruled. The finding of the court was in favor of the appellees, and an order was made appointing one Simonson receiver. Simonson thereupon qualified by taking the oath and giving bond as required by the statute. To all rulings against it, exceptions were reserved by the appellant.

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Some fourteen errors are assigned, seven of which question the jurisdiction of the court and judge over the subject of the action and the person of the appellant; four deny the validity of the appointment of the receiver; two relate to the refusal of the judge to postpone the hearing; and one alleges the insufficiency of the facts stated in the complaint to constitute a cause of action.

If the court had jurisdiction over the person of the appellant, the judge of the court, at chambers, in vacation, likewise possessed it. §1236 Burns 1901; *Pressley v. Lamb*, 105 Ind. 171; *First Nat. Bank v. United States, etc., Co.*, 105 Ind. 227, 236.

The objection to the jurisdiction of the court over the person of the appellant is placed upon the ground that, by an uncontradicted affidavit submitted by the appellant, it appeared that the principal office and usual place of residence of the appellant were in Delaware county, and, hence, that it could not be sued in Clay county. Whatever uncertainty may have existed under former statutes as to service of process in such cases, the question has been put to rest by the act of February 7, 1899 (Acts 1899, p. 13), which provides: "That any action against any corporation, organized under any law of this State, may be brought in any county where such corporation has an office or agency for the transaction of business, or in which any person resides upon whom process may be served against such corporation." But, aside from the effect of this statute, it is to be remarked that, upon its so-called special appearance to the application for the appointment of a receiver, the appellant did much more than object to the jurisdiction of the court over its person. It expressly challenged the sufficiency of the facts stated in the complaint to constitute a cause of action. The motion, therefore, must be treated as a demurrer, as well as a motion affecting the jurisdiction of the court. Such a demurrer operates as a full appearance to the action and as a waiver of all objections to the jurisdiction of the

court over the person of the defendant. *Slauter v. Hollowell*, 90 Ind. 286; *Bauer v. Samson Lodge*, 102 Ind. 262, 266.

There was, therefore, a voluntary appearance by the appellant to the action, and a waiver of all objections to the jurisdiction of the court over its person, if such objections existed.

The jurisdiction of the court over the subject of the action is contested upon the ground that, while some fourteen plaintiffs joined in the complaint, no joint cause of action was stated. There is nothing in the objection as thus presented. The subject of the action was the enforcement of a money demand against the appellant, and the seizure and distribution of the property of the appellant through the agency of a receivership. Of such a subject, the jurisdiction of the court is unquestionable. The objection goes rather to the sufficiency of the facts stated to show that the plaintiffs below had a common interest in the subject of the action, or in the relief demanded, than to the jurisdiction of the court over the subject of the action. All of the claims mentioned in the complaint were within the jurisdiction of the circuit court, no right of action being asserted under any statute which required the action to be brought in any particular jurisdiction. But, even if some of the claims set out in the complaint were improperly joined with others, over which the court had no jurisdiction, such misjoinder would not defeat the jurisdiction of the court. As to the latter the action might be dismissed in the trial court. *Hursh v. Hursh*, 99 Ind. 500; *Naylor v. Sidener*, 106 Ind. 179-184; *Iron Hall v. Baker*, 134 Ind. 293, 20 L. R. A. 210; *Gray v. Oughton*, 146 Ind. 285, 286.

The code provides that all persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided in the act. It has been held that a common interest in the relief sought authorizes the joinder of several

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plaintiffs, although in other respects their interests are separate and distinct. *First Nat. Bank v. Sarlls*, 129 Ind. 201, 13 L. R. A. 481, 28 Am. St. 185; *McIntosh v. Zaring*, 150 Ind. 301; *Robbins v. Sand Creek, etc., Co.*, 34 Ind. 461; *Small v. Hammes*, 156 Ind. 556. And judgment creditors, although their claims are several, may unite in a suit to set aside a fraudulent conveyance, and subject the property to the payment of their judgments. *Ruffing v. Tilton*, 12 Ind. 259; *Field v. Holzman*, 93 Ind. 205; *Doherty v. Holliday*, 137 Ind. 282. In view of the rule, that, where there is unity in interest as to the object to be obtained by the bill, the parties seeking redress in chancery may join in the same complaint and maintain their action together, we think the plaintiffs had the right to prosecute this action jointly. *Powell v. Spaulding*, 3 Greene (Iowa) 443. Besides, upon an appeal from an interlocutory order appointing a receiver, the insufficiency of the facts stated in the complaint, including the improper joinder of parties plaintiff, will be disregarded, except so far as it relates to the appointment prayed for. *Woollen's Special Proc.*, §2280, and cases cited.

In the next place, it is objected that the complaint does not make a case for the appointment of a receiver, for the reason (1) that it does not show that the appellees have exhausted their legal remedies; (2) that the mere averment of insolvency does not authorize the appointment of a receiver; and (3) that a creditor who has not reduced his claim to judgment has no right to ask for such appointment. It is not necessary that the party applying for a receiver should have exhausted his remedies at law. It is sufficient if it appears that such remedies are inadequate, or would be ineffectual, or that the appointment of a receiver is necessary to preserve the property or fund, or to secure justice to the parties. Nor do we think that the complaint is defective because it does not set out specifically the facts from which the insolvency of the corporation could

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be inferred. The charge that the appellant is insolvent tends an issue of fact, and is in the exact words of the statute. Upon such an issue each party would be at liberty to prove the nature and value of the property of the corporation, and the extent and character of its indebtedness, its inability to pay its obligations as they matured and were presented, or its readiness to meet its just financial engagements. No general rule requires that a creditor shall first reduce his claim to judgment before asking for the appointment of a receiver, and the statute of this State concerning the appointment of receivers can not be so understood.

The appellant insists that the facts proved, upon the hearing of the application for the appointment of the receiver, were not sufficient to authorize such appointment. The affidavits submitted by the appellees showed the existence of a considerable part of the indebtedness described in the complaint, and that much of it had long been due. They stated, also, that the property of the appellant was encumbered by mortgages to its full value; that it owns no rolling-stock; that it does not own even the rails constituting its tracks; that it is indebted many thousands of dollars outside of its mortgage debt; that it is now, and for more than three years past it has been, unable to pay its employes; and that it is wholly insolvent.

The appellant contends that the statement in the affidavits presented by the appellees that the appellant is insolvent is the averment, not of a fact, but of a conclusion. Insolvency is provable, undoubtedly, by evidential facts showing its existence; but it is provable, also, by the direct averments of those who know the financial condition of the person or corporation. In *First Nat. Bank v. United States, etc., Co.*, 105 Ind. 227, 236, the court say that both the allegations of facts from which insolvency was inferable, and the direct averment of insolvency, were statements of "issuable facts," which the corporation could admit or deny.

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See, also, *Main v. Ginthert*, 92 Ind. 180, 186. Insolvency is the state of a person who is unable to pay his debts as they fall due in the usual course of trade or business. 11 Ency. PL. & Pr., 3. An excess of assets over liabilities does not of itself render the debtor solvent. The assets may not be readily convertible into money and, notwithstanding their supposed value, the debtor may not be able to pay the claims against him as they become due. "By the word 'insolvency' is meant a general inability to pay one's debts; and of this inability, the failure to pay one just and admitted debt would probably be sufficient evidence." Benjamin, Sales, §837; Smith, Mercantile Law, 550.

The evidence included not only the declarations of the affiants that the appellant was insolvent, or in imminent danger of insolvency, but it showed, also, that the judgments and other claims of some of the appellees had long been due and unpaid, and that the appellant, while admitting their justice and validity, persistently refused to pay them. The proof did not stop here. It disclosed that the property of the appellant was encumbered by mortgages to its full value; that the appellant owns no rolling-stock; that its rails are owned by other persons; that it owes large sums in addition to its mortgage debts; and that for more than three years past it has been unable to pay its employees. It is true that some of these statements are controverted by affidavits submitted on behalf of the appellant; but the judge, before whom the application was made, had to decide between these conflicting statements. He did so, and we can not say that his decision was erroneous, or that there was an abuse of judicial discretion in such decision. The proof on the part of the appellees demonstrated the futility of an attempt to collect the claims of the appellees by the ordinary process of execution. *Cabinet Makers Union v. City of Indianapolis*, 145 Ind. 671; *Mead v. Burk*, 156 Ind. 577, 580, 581, and cases cited on page 582.

As was said by the court in *Mead v. Burk*, *supra*: "The rule that this court will not weigh evidence on appeal finds no exception in suits in equity, nor in actions or proceedings where the evidence upon the trial or the hearing of the matter in issue is presented to the lower court by means of depositions, affidavits, or other documentary evidence. *Cabinet Makers' Union v. City of Indianapolis*, 145 Ind. 671. In order to justify this court in disturbing a judgment of the lower court in any case or proceeding upon the evidence alone, the latter must be such as to raise a question of law, and not one merely of fact. *Lee v. State*, 156 Ind. 541, and cases there cited. Under this rule, the order appointing a receiver will not be disturbed on appeal upon the evidence alone, unless the appellant or complaining party clearly shows by it that thereby a matter of law in respect to the abuse of discretion on the part of the trial court is presented. As in other cases where there is evidence to sustain the order upon every essential point, it will not be reversed on appeal. *Pouder v. Tate*, 96 Ind. 330; *Naylor v. Sidener*, 106 Ind. 179."

The ninth and eleventh assignments of error question the propriety of the refusal of the judge to postpone the hearing of the application upon the tender of a bond by the appellant to secure the payment of such of the claims as should be found just and owing. The object of the proposed delay was to afford the appellant an opportunity to investigate some of the claims set out in the complaint, and to produce evidence against them. This was not a matter connected directly with the appointment of the receiver, and the decision of the court as to these claims was interlocutory only, and not final. Their validity was subject to full investigation and proof upon the final trial. The payment or bond tendered was not sufficient to cover all the claims set out in the complaint. The judge could not discriminate

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between them, nor was he compelled to decide upon their merits at that stage of the proceedings.

The fourteenth and last error assigned is waived by the failure of counsel for appellant to discuss it.

Finding no error, the judgment is affirmed.

THACKER v. CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY.

[No. 19,614. Filed June 20, 1902.]

MASTER AND SERVANT.—Employers Liability Act.—Common Law Liability.—Railroads.—The provision of subdivision four of §7083 Burns 1901 making railroad companies or other corporations, except municipal, liable for damages for personal injuries to employes caused by the negligence of a fellow servant, the fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the power to direct, is the mere enactment of a liability which already existed at common law, and limits the common law right of recovery to persons injured while obeying or conforming to the order of some superior at the time of the injury having power to direct. *pp. 84-87.*

SAME.—Fellow Servant.—A section foreman in transporting section-hands to and from work on a hand-car is a fellow servant with the section-hands. *p. 87.*

SAME.—Negligence.—Complaint.—A complaint against a railroad company by a section-hand for personal injuries sustained while being transported to work on a hand-car, caused by the sudden stopping of the car in response to a signal given by the section foreman, is insufficient, where no facts showing negligence on the part of the foreman are alleged. *pp. 87-91.*

SAME.—Employers Liability Act.—Fellow Servant.—A railroad company is not liable under the third subdivision of §7083 Burns 1901, for the injury of an employe resulting from the act of a fellow servant done in response to an instruction given by one delegated with authority of the corporation in that behalf, where the order was a proper one, but negligently performed by the fellow servant. *pp. 87-91.*

SAME.—Employers Liability Act.—A complaint against a railroad company by an employe for personal injuries sustained in being thrown from a hand-car which avers that the section foreman negligently ordered the brakemen to stop the car when the same was going at a speed of twenty miles an hour, without giving

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161	679
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162	114
162	520
162	561

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163	621

159	82
164	521

159	82
165	683

159	82
167	203
168	227
168	449

159	82
169	9
169	31
169	685
170	376

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plaintiff notice, and that the brakemen complied with the order, and stopped the car suddenly, as it was their duty to do, and plaintiff was thereby thrown from the car and injured, states a cause of action within the meaning of the second subdivision of §7083 Burns 1901. pp. 91-94.

From Monroe Circuit Court; *W. H. Martin*, Judge.

Action by Charles Thacker against the Chicago, Indianapolis and Louisville Railway Company for damages on account of personal injuries sustained. From a judgment for defendant on demurrer to complaint, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed*.

W. E. Hottle, *J. R. East* and *R. H. East*, for appellant.
E. C. Field and *W. S. Kinnan*, for appellee.

MONKS, J.—Complaint by appellant for personal injuries, in four paragraphs. Demurrer to each paragraph for want of facts sustained. Appellant refusing to plead further, judgment was rendered against him. The assignments of error not waived call in question the action of the court in overruling the demurrer to the first, second, and fourth paragraphs of the complaint.

Appellant was a section man engaged in the line of his duty with an extra gang of men running a hand-car to Bryfogle, a station on appellee's road. One McGill was section foreman, and had ordered the men to make this trip for the purpose of doing work at said place. Appellant and the other men in the gang were working under the orders of said foreman. It required two hand-cars to carry the men. Appellant, with others, was riding on the front hand-car, and following this was another hand-car on which the foreman and other laborers were riding. The front car, on which appellant was riding, had two men who acted as brakemen, and who could check, stop, or control the movement of the hand-car by pressing their feet on a brake; that it was the duty of said brakemen, when the signal was given by the foreman, McGill, to put on or take off the brake and otherwise control said car. In addition to the above, it is alleged

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in the first paragraph of the complaint that in approaching Bryfogle they were going down grade at a speed of fifteen or twenty miles an hour, when "McGill gave a signal to said brakemen to stop; that it was the duty of said brakemen, and each of them, when said signal to stop was given, to notify those on the car of said signal, and give them time to catch hold of something, or stay themselves in some way, but that when said signal to stop was given said brakemen, without giving any warning or notice of any kind, or before any warning or notice could be given, said brakemen at once threw on the brake in a careless and reckless manner, bringing said car to such a sudden stop that appellant was pitched violently forward off said hand-car" and injured.

Appellant says this action was brought under the employer's liability act, and that the first paragraph is founded on the fourth subdivision of §7083 Burns 1901, §5206s Horner 1901, which reads as follows: "That every railroad * * * shall be liable for damages for personal injuries suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence * * *. Fourth. Where such injury was caused by the negligence of *any person in the service of said corporation who has charge of any signal, telegraph office, switch yard, shop roundhouse, locomotive engine or train upon a railway*, or where such injury was caused by the negligence of any person, co-employe, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct."

Appellant concedes that said first paragraph would be bad at common law, because it shows that his injury was caused by the negligence of the brakemen, his fellow serv-

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ants, but insists that the same is sufficient under that part of said subdivision not in italics.

At common law a master owes certain duties to his servants which concern their safety, and if he intrusts such duties to one of his servants, who negligently performs the same, by reason of which another servant is injured without his fault, the master is liable therefor, because the servant to whom such duties are intrusted is, in the performance thereof, a vice principal, and not a fellow servant. A vice principal, therefore, is one who represents the master in the discharge of those duties which the master owes to his servants. If, however, the servant whose negligence caused the injury was not at the time discharging a duty which the master owed to his servants, but simply a duty which the servant owed to the master, he was a fellow servant with others engaged in the common business, and the master would not be liable for any injury inflicted upon such fellow servants by reason of his negligence. *Justice v. Pennsylvania Co.*, 130 Ind. 321, 325, and cases cited; *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 687, 688, and cases cited; *Robertson v. Chicago, etc., R. Co.*, 146 Ind. 488; *Mitchell v. Robinson*, 80 Ind. 281, 284, 41 Am. Rep. 812; *Krueger v. Louisville, etc., R. Co.*, 111 Ind. 51, 52; *Brazil, etc., Co. v. Young*, 117 Ind. 520, 522; 12 Am. & Eng. Ency. Law (2d ed.), 946, 948.

In this State there is a clear distinction between a superior servant and a vice principal. A superior servant is generally one who has authority to direct and control other servants, and may or may not be charged with any of the duties which the master owes his servants. Whether or not one is a vice principal does not in any way depend upon his rank. *Justice v. Pennsylvania Co.*, *supra*; *Hodges v. Standard Wheel Co.*, *supra*; *Robertson v. Chicago, etc., R. Co.*, *supra*; 12 Am. & Eng. Ency. Law (2d ed.), 948, 949.

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Before the passage of said act, it was held as to most, if not all, of the persons described in that part of said fourth subdivision printed above in italics, for whose negligence railroads are made liable, that they did not perform any duty which a railroad owed its servants, and that they were, therefore, mere fellow servants, for whose negligence railroads were not liable. That part of said subdivision has, therefore, enlarged liabilities of railroads. *Baltimore, etc., R. Co. v. Little*, 149 Ind. 167; *Indianapolis Union R. Co. v. Houlihan*, 157 Ind. 494, 499, 54 L. R. A. 787.

It is evident, however, that the part of said subdivision upon which appellant bases his first paragraph of complaint only makes railroads liable for the negligence of such persons as are performing duties which it owes its servants in certain cases. Such persons were vice principals, and employes injured by their negligence in the discharge of such duties could recover therefor before said act was passed. It is clear that such part of said subdivision is the mere enactment of a liability which already existed at common law, and that the class of vice principals was not increased thereby. It is not as broad as the common law liability, because the right to recover is limited to persons injured while obeying or conforming to the order of some superior at the time of the injury having power to direct. The right to recover for injuries caused by the negligence of vice principals is not so limited at common law. It follows that if said appellant's first paragraph of complaint is not good at common law, which he concedes it is not, it is not good under the part of said fourth subdivision, upon which he claims it is founded.

It was held by this court in *Justice v. Pennsylvania Co.*, 130 Ind. 321, 325, 326, that a section foreman of a railroad having power to employ and discharge section-hands is a vice principal when employing and discharging such employes, but that he was a fellow servant in his control of such men after their employment. The court said in that

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case: "That a section foreman may be a vice principal is not doubted. In this case he was a vice principal in the matter of hiring and discharging hands, for the master owes it as a duty to exercise reasonable care not to employ any but careful men, and to discharge those who prove to be negligent. In the hiring and discharging of the men he was in the performance, therefore, of a duty which the master owed to his servants and was, while so engaged, a vice principal. But it was not so in transporting the men to and from their work. In the matter of moving the hand-car and their tools to and from the locality at which they worked upon the track, they were in the discharge of a duty which they owed the master and were, therefore, fellow servants. *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Ohio, etc., R. Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Slattery v. Toledo, etc., R. Co.*, 23 Ind. 81; *Sullivan v. Toledo, etc., R. Co.*, 58 Ind. 26; *Gormley v. Ohio, etc., R. Co.*, 72 Ind. 31; *Robertson v. Terre Haute, etc., R. Co.*, 78 Ind. 77, 41 Am. Rep. 552; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; *Boyce v. Fitzpatrick*, 80 Ind. 526; *Capper v. Louisville, etc., R. Co.*, 103 Ind. 305."

Even if McGill, the foreman, in giving the signal to stop the hand-car was performing a duty which the master owed its servants, and was, as to the same, a vice principal, yet no liability is shown by the allegations of said first paragraph, because no facts showing negligence on the part of said foreman are alleged therein. The court did not err in sustaining the demurrer to the first paragraph of complaint.

The second paragraph alleges the same facts as the first, but charges that the foreman, "McGill, gave the signal to said brakemen to put on brakes; that the brakemen in obedience to the particular instruction given by said foreman, McGill, who was delegated with the authority of the corporation in behalf of said company, put on the brakes, and brought the car to such a sudden stop that appellant was

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pitched violently out of said car" and injured. "That said injury resulted from the act of said brakemen done in obedience to the particular instruction given by said McGill, who was delegated with the authority of the corporation in that behalf."

Appellant insists that said paragraph is sufficient under that part of the third subdivision of said §7083 Burns 1901, §5206s Horner 1901, which is as follows: "Where such injury resulted from the act or omission of any person done or made * * * in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf." Said subdivision 3 is the same as clause 4 of §1 of the English employer's liability act of 1880, and clause 4 of §2590 of the Alabama employer's liability act of 1885.

What is obedience to particular instructions was considered in *Whatley v. Holloway*, 6 Times L. Rep. 190, 62 Law T. Rep. (N. S.) 639, 54 Just. P. 645, decided in 1890. In that case one Ancliffe was employed by the defendant to attend to an engine and boiler. His duty was also to assist the plaintiff in working a circular saw, in doing which he was instructed not to neglect the engine. At the time of the accident Ancliffe and the plaintiff were at work with the saw; the plaintiff feeding it with wood, Ancliffe at the other end receiving the wood as it came from the saw, and holding the same so as to steady it. A noise being heard from the engine indicating that it required attention, Ancliffe let go the piece of wood he was holding, without warning. The result was that the piece of wood the plaintiff was holding was rendered unsteady, and the plaintiff's hand was knocked against the saw and injured. The jury found a verdict for the plaintiff, with £40 damages. The question was whether, under said subdivision 4, there was an act or omission done or made in obedience to particular instructions. The plaintiff contended that the instruction to Ancliffe not to neglect the engine was a particular in-

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struction, obedience to which caused the accident. Defendant's contention was that no particular instruction within said subdivision had been given, and if the instruction was held to be a particular one, that Ancliffe's act was merely the negligent act of a fellow servant, and not done in obedience to the instruction. On appeal, the divisional court was in favor of defendant's contention that the instruction given to Ancliffe was not a particular instruction within the meaning of the statute. For the purposes of the case, however, the court assumed that it was, and said, in substance, that the instruction to Ancliffe was not to neglect the engine; that this meant that he was to attend to the engine with due regard to the safety and lives of others, and not that he should look after the engine at all hazards without regard to the safety of others; that the instruction was a reasonable one; that the engine was to be Ancliffe's first care, at the same time leaving his other work in a proper and reasonable manner. If Ancliffe had waited a few seconds and given plaintiff notice before leaving, that would not have been a disobedience to the instruction. Therefore, Ancliffe was not required by the instruction to do as he did. "The injury, therefore, was caused here, not by Ancliffe's obedience but by his disobedience to his instructions." Judgment was accordingly rendered for the defendant. This was affirmed in the court of appeal where Lindley, L. J. in *Whatley v. Holloway*, 6 Times L. Rep. 353, 354, said: "No doubt Ancliffe was required to attend to the engine, but the instruction did not require him, when it was necessary to attend to the engine, to leave the saw without giving his mate notice. It was impossible to construe Ancliffe's instructions as involving this, that he must go away without giving notice to the plaintiff." This was the construction given said subdivision in 1890 by the English courts long before the same was reenacted in this State in 1893, as subdivision 3 of §1 of the employer's liability act. *City of Laporte v. Gamewell, etc., Co.*, 146 Ind.

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466, 469, 35 L. R. A. 686, 58 Am. St. 359; *Hilliker v. Citizens St. R. Co.*, 152 Ind. 86, 88, and authorities cited; *Board, etc., v. Conner*, 155 Ind. 484, 496, and authorities cited.

In the second paragraph, the right of McGill to give the signal to stop the hand-car, and that it was given in a proper manner, is not questioned. Said signal, if it may be called an instruction within the meaning of said subdivision, did not require the brakemen to stop the hand-car in such a manner as to endanger the lives of the persons riding thereon, but that they should stop the car with a due regard to the safety of the persons mentioned. It is evident that, if the brakemen in response to the signal to stop had stopped the hand-car with a due regard to the lives of the persons on the car, and without injuring them, it would not have been a disobedience to such signal. Said signal did not require the brakemen to stop the car in the manner they did. The injury was therefore caused not by the brakemen's obedience, but by their disobedience to McGill's signal, as was said in *Whatley v. Holloway*, 6 Times L. Rep. 190, 62 Law T. Rep. (N. S.) 639, 54 J. P. 645; and said second paragraph is not, therefore, sufficient under said subdivision 3. *Laughran v. Brewer*, 113 Ala. 509, 518, 21 South 415. It is not necessary, therefore, to determine whether or not the signal given by McGill to the brakeman to stop the car was a particular instruction, or whether or not he was delegated with the authority of the railroad in that behalf, within the meaning of said subdivision 3.

Appellant contends that the fourth paragraph of complaint is sufficient under the second subdivision of §7083 Burns 1901, §5206a, Horner 1901, which is as follows: "Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform." This subdivision is substantially the same as subdivision 3 of §1 of the

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English employer's liability act of 1880, and the Alabama employer's liability act of 1885.

Appellee insists that no negligence is charged against McGill as foreman, in said fourth paragraph, and that, before appellant can recover under said subdivision 2, "the injury must have resulted (1) from the negligence of one clothed with authority to give the order to the injured servant; and (2) the injured employe must, at the time, have been conforming to such negligent order, and conforming because he was bound to do so; that no negligent order was given appellant. The case is simply one of a proper order given in a proper way, and, through the negligence of fellow servants of appellant in the execution of the order, his injury resulted."

Counsel for appellee are incorrect in their claim that the fourth paragraph of complaint does not charge any negligence against McGill, but only shows that the injury was caused by the negligence of the brakemen. Said fourth paragraph is the same as the first, except it is expressly averred that "McGill, the section foreman, negligently gave the brakemen on the front hand-car the signal to stop the front hand-car suddenly and quickly when the same was going at the speed of twenty miles per hour, without giving appellant and the other persons on the front of said car notice thereof; and that said brakemen complied with said signal and stopped said car suddenly and quickly, as it was their duty to do, and thereby appellant was thrown violently from the car and injured; that the obedience to said order so to stop said car would necessarily cause said car to stop suddenly, and would endanger the life and limb of this appellant and others so stationed on said front car; and so to stop said car while running at the rate of twenty miles per hour was calculated greatly to increase the danger and hazard to appellant, which said McGill well knew, and did increase the danger and hazard to him, and by reason of giving said order as herein set out appellant received his

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injuries; that he had no notice or knowledge, and no means of knowing, said hand-car was to be stopped when it was, or that such order to stop was or would be given by said McGill, section foreman."

It is also alleged in said paragraph that "McGill, section foreman, ordered said extra gang of men, including appellant, to go on hand-cars over appellee's track to meet a gravel train for the purpose of unloading the gravel from the cars of said train; that appellant, in obedience to the orders of said McGill, in company with eight others of said extra gang, got on one hand-car, and McGill and the others of said extra gang got on another hand-car, and started to meet said gravel train;" that appellant was bound to conform, and did conform, to said order of McGill, section foreman, in going upon said hand-car to meet said gravel train.

It is true, as a general rule, that a section foreman, in giving such signal, has the right to assume that the brakemen will obey the same intelligently, having a due regard to the safety of themselves and others; that they will execute such signals in such manner and with such precaution as not to endanger the life or limb of anyone, if that can reasonably be done without disobedience to the order. If it was the duty of the brakemen, when the signal to stop was given by McGill, to notify those on the car with them of such signal, in order to give them an opportunity to protect themselves, and the failure to give such notice, or any other negligence on the part of the brakemen who, under the circumstances, were the fellow servants of appellant, caused the injury, appellee was not liable. It is alleged, however, that the injury complained of was caused by the negligence of the section foreman.

It is not necessary, as was held by this court in *Louisville, etc., R. Co. v. Wagner*, 153 Ind. 420, that the "order or direction in said subsection be negligent, but it is sufficient if the employe was bound to conform and was con-

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- forming at the time of the injury to the order or direction of the person whose negligence caused the injury." Ruegg, *Employer's Liability* (5th ed.), 106, 107; Beven, *Employer's Liability* (2d ed.), 152-161; Dresser, *Employer's Liability*, 308; *Wild v. Waygood* (1892), 1 Q. B. 783, 8 Times L. Rep. 410, 61 L. J. Q. B. 391.

The question as to what kind of orders and directions is referred to in subdivision 2, and the connection that must exist between such "order or direction" to which the injured employe is bound to conform and is conforming when injured, and the negligence of the person giving such order or direction, is discussed to some extent in the following authorities: Ruegg, *Employer's Liability* (5th ed.), 98-105; Beven, *Employer's Liability* (2d ed.), 152-161; Dresser, *Employer's Liability*, §§64-68, pp. 295-310; *Louisville, etc., R. Co. v. Wagner, supra*; *Snowdon v. Baynes*, L. R. 24 Q. B. D. 568, 59 L. J. Q. B. 325; *Wild v. Waygood, supra*; *Mobile, etc., R. Co. v. George*, 94 Ala. 199, 218, 219, 10 South. 145; *Birmingham, etc., R. Co. v. Gross*, 97 Ala. 220, 226, 227, 12 South. 36; *Mary Lee, etc., Co. v. Chambliss*, 97 Ala. 171, 176, 11 South. 897. See, also, *Dantzler v. DeBardeleben, etc., Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361.

It was said in *Louisville, etc., R. Co. v. Wagner, supra*, p. 424: "The order to loose the truck was the proximate cause of the plaintiff's injury. And it was both directing the plaintiff into a dangerous situation, that he was thus bound to enter, and then ordering the truck turned loose upon him without warning that constitutes the actionable wrong. See *Wild v. Waygood, supra*; *Wright v. Wallis*, 3 Times L. Rep. 779; *City Council v. Harris*, 101 Ala. 564, 14 South. 357."

We have only considered the objections to the fourth paragraph of complaint urged by appellee, as stated above, and it is clear that they are not tenable. The judgment is, therefore, affirmed as to the first, second, and third para-

graphs of complaint, and reversed as to the fourth, with instructions to overrule appellee's demurrer thereto, and for further proceedings not inconsistent with this opinion.

THE STATE v. ROCKWOOD ET AL.

[No. 19,758. Filed June 20, 1902.]

CONTEMPT.—*Criminal Law.—Appeal.*—An appeal may be taken by the State, under §1915 Burns 1901, from the action of the court in dismissing a proceeding for an indirect contempt of court. *pp.* 95-97.

APPEAL AND ERROR.—*Record.—Bill of Exceptions.*—An entry reciting "comes now the State * * and files a bill of exceptions therein as follows," followed by a bill of exceptions containing a recital that it was signed by the judge, on a certain date, sufficiently shows that the bill was signed before it was filed. *p.* 97.

CONTEMPT.—*Grand Jurors.—Affidavit.*—An affidavit in a proceeding against grand jurors for an indirect contempt of court charging that "said jurors, or at least some of them," were guilty of the misconduct charged, is bad for the uncertainty in the description of the jurors intended to be charged with the contempt. *pp.* 98, 99.

From Marion Criminal Court; *Fremont Alford*, Judge.

Proceeding by the State against Charles B. Rockwood and others, grand jurors, for an indirect contempt of court. From a judgment in favor of defendants, the State appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *J. C. Ruckelshaus*, *Eli F. Ritter* and *C. J. Orbison*, for State.

C. W. Smith, *J. S. Duncan*, *H. H. Hornbrook* and *A. P. Smith*, for appellees.

DOWLING, C. J.—This was a proceeding under the statute against the appellees and three others for an indirect contempt of the court. It was commenced by the filing of an affidavit in the Marion Criminal Court by a citizen of said Marion county, alleging that the persons named in the affidavit were the members of the

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grand jury of Marion county, Indiana, duly selected, impaneled, instructed, and sworn, and charging them with official misconduct tending to bring the administration of justice into disrepute, and the court into contempt. A rule was entered against the persons so accused requiring them to appear on November 1, 1901, and show cause why they should not be punished for the contempt alleged against them. The appellees, Rockwood, Haugh, and McCaslin, appeared and separately moved for the discharge of the rule. Over the objection and exception of the State, the motion was sustained, and the proceedings were dismissed. The other three grand jurors appeared in person, but filed no motion or other pleading, and no further notice need be taken of them. The State appeals, and the decision of the court upon the motion to discharge the rule is assigned for error.

The right of the State to appeal in a proceeding of this character is denied by the appellees, even if the proper construction of a statute is involved, and that question is duly presented, and this point must first be disposed of. It seems to be settled in this State that a proceeding for a contempt is in the nature of a criminal action. *Whittem v. State*, 36 Ind. 196; *Baldwin v. State*, 126 Ind. 24, 31; *New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354. The right of appeal exists only in those cases where it is given by statute. "The right to an appeal is and always has been statutory, and does not exist at common law. It is a remedy which the legislature may in its discretion grant or take away, and it may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal from a judgment of a court of inferior jurisdiction, none can be taken." *Sullivan v. Haug*, 82 Mich. 584, 46 N. W. 795, 10 L. R. A. 263; *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 600, 605.

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If the State has the right of appeal in proceedings for contempt, such right must be conferred either by the acts regulating proceedings of this kind or by the general provisions of the criminal code. The act of May 31, 1879 (Acts 1879, p. 112, §7, §1023 Burns 1901, §1011 R. S. 1881 and Horner 1901), provides that if the court finds the defendant guilty of a direct contempt, the defendant may move for a new trial and the rescission of the judgment against him, and that, upon the overruling of the motion, he may except, and file a bill of exceptions as in other criminal actions, and that in all cases an appeal shall lie from such judgment to the Supreme Court. While a right of appeal is given to the defendant by this section, none is granted to the State.

Section 9 of the act of 1879, *supra*, §1025 Burns 1901, §1013 R. S. 1881 and Horner 1901, regulating the procedure in cases of indirect contempts, authorizes an appeal to the Supreme Court "in the same manner as in cases of direct contempts." Neither of these sections authorizes an appeal by the State where the defendant is discharged.

But long before the passage of the act of May 31, 1879, this court held, in *Whittem v. State*, 36 Ind. 196, 201-206, that in proceedings for a contempt the defendant had the right of appeal under the provisions of the criminal code giving an appeal to the Supreme Court from all final judgments. The acts of 1879 and 1881 on the subject of direct and indirect contempts must be construed in connection with the sections of that code, and, as they contain nothing which denies an appeal to the State, it is clear upon the authority of *Whittem v. State*, *supra*, that an appeal may be taken as well by the State as by the defendant.

The language of the statute is so general and comprehensive that no sufficient reason occurs to us why it may not be held that proceedings for a contempt are included in it. Section 1914 Burns 1901, §1845 R. S. 1881 and Horner 1901, is as follows: "On the trial of a criminal prosecution,

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exceptions may be taken by the defendant to any decision of the court upon a matter of law by which his substantial rights are prejudiced." And the section immediately following is in these words: "The prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the Supreme Court." §1915 Burns 1901.

As the court held §1914, *supra*, broad enough to cover a proceeding for a contempt, and to secure to the defendant a right of appeal, so, we are of the opinion that §1915, *supra*, giving to the State a qualified right of appeal, is equally comprehensive, and when the case is appealable under §§7, 8 of the act of 1901 (Acts 1901, p. 565, §§1337g, 1337h Burns 1901), extends as well to prosecutions for a contempt as to ordinary criminal trials.

The next point made by the appellees is that it is not shown that the bill of exceptions was signed by the judge before it was filed, and, therefore, that it is not properly in the record. The entry immediately preceding the bill of exceptions is in these words: "Comes now the State of Indiana by John C. Ruckelshaus, prosecuting attorney, and Eli F. Ritter, of counsel, and files a bill of exceptions herein as follows, viz.:" A bill containing a recital that it was signed by the judge of the criminal court on November 5, 1901, is then set out. It is evident from this entry that the bill was signed before it was filed.

Finally, counsel for appellees insist that the grounds for the proceeding, as stated in the affidavit, were insufficient, and that the court had no power to inquire into the reasons of the grand jury for refusing to return bills of indictment in the cases referred to. The charge against the grand jurors in the affidavit, upon which the proceeding rests, is, in brief, that, although they had before them the uncontradicted testimony of credible witnesses that divers persons, who were named in the affidavit, had committed

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certain specific offenses, yet that "said jurors, or at least some of them, at said October term, were guilty of misconduct, and contempt of this court in this: That they were controlled and actuated by prejudice and obstinacy, wholly disregarded said evidence, their oaths, and legal duties in the premises, and said instructions of this court, and wilfully treated said instructions of this court with contempt, and refused to join in the return of, and thereby defeated and prevented any indictment against any of the offenders as aforesaid, and permitted said offenses and offenders to be disregarded for the purpose and with the intent of favoring and shielding said offenders from punishment."

We are compelled to hold the affidavit bad for uncertainty in the description of the jurors intended to be charged with the contempt. The language of the affidavit is "that the said jurors, or at least some of them," were guilty of the misconduct set forth. The affidavit contained no accusation against any one in particular. It was in the alternative and implied that some of the jurors were without fault; yet it did not say which jurors were guilty.

In proceedings of this character, a considerable degree of strictness in the statement of the charge against the party or parties accused of the contempt is always required. In *Worland v. State*, 82 Ind. 49, it was said: "In this case the charge is that the publication was 'false and grossly inaccurate,' and the question is whether that is sufficiently definite. We have come to the conclusion that it is not. The use of the words '*grossly inaccurate*' implies that the publication was not wholly false, and that the word *false*, as used, meant only false in some respects or degree. This being so, it is a plain and just requirement that the particulars in which it was designed to show that the publication was false or inaccurate should have been stated. It may be that some of the statements contained in the publication are not such as to sustain a charge of contempt, if conceded to be false or inaccurate. The charge surely ought

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to be so definite and distinct that its meaning and sufficiency could be determined on motion, and that the accused could know certainly what he was required to answer."

If this degree of certainty is required as to the charge itself, the persons accused should be pointed out with the same degree of particularity. The court did not err in sustaining the motion to discharge the rule against the appellees.

The apparent object of this appeal is to obtain a construction of §1732 Burns 1901, §1663 R. S. 1881 and Horner 1901, which declares that a grand juror cannot be questioned for anything he may say, or any vote he may give in the grand jury relative to a matter pending before it; but as the affidavit upon which the proceedings for the alleged contempt were founded fail to charge any member of the grand jury with the supposed contempt, and is therefore fatally defective, the question of the proper construction of the statute referred to is not "duly presented," as required by §§7 and 8, of the act of 1901, Acts 1901, p. 565, §§1337g, 1337h Burns 1901, and therefore can not be considered.

Appeal dismissed.

**CREAMERY PACKAGE MANUFACTURING COMPANY
v. HOTSENPILLER.**

[No. 19,864. Filed June 20, 1902.]

APPEAL AND ERROR.—Master and Servant.—Judgment.—A judgment for personal injuries will not be reversed because the evidence as to some features of the case can not be said to be strong or of great weight, where there is evidence to sustain the general verdict and the material special findings of the jury in answer to interrogatories submitted. *pp. 102, 103.*

SAME.—Record.—New Trial.—Affidavits.—Alleged error in overruling a motion for a new trial because of newly discovered evidence will not be considered on appeal, where the affidavits in support thereof are not made a part of the record by bill of exceptions or order of court. *pp. 103, 104.*

159	99
164	688
159	99
166	300

159	99
170	216

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MASTER AND SERVANT.—*Personal Injuries.*—*Evidence.*—In an action by a servant for personal injuries from a defective machine, evidence by a witness as to the condition of the machine based upon an examination of the machine, made a week after the accident, was properly admitted, where it was shown that the machine was then in the same condition as at the time of the accident. pp. 104, 105.

DAMAGES.—*Excessive.*—*Master and Servant.*—*Personal Injuries.*—A judgment in an action for personal injuries will not be reversed on the ground that excessive damages were awarded, where it does not appear that the jury in awarding damages was influenced by prejudice, passion, partiality, or corruption. pp. 105, 106.

From Randolph Circuit Court; *W. O. Barnard*, Special Judge.

Action by Marcus Hotsenpiller against the Creamery Package Manufacturing Company for personal injuries. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

O. H. Adair, J. F. LaFollette, J. W. Headington and O. S. Whiteman, for appellant.

J. J. Cheney and E. L. Watson, for appellee.

JORDAN, J.—Appellant is a corporation engaged, at the city of Portland, Jay county, Indiana, in operating a plant for manufacturing butter-tubs, etc. In its factory it had in operation a number of machines, one of which was denominated a "truss machine," and was used for the purpose of equalizing the staves used in constructing butter-tubs. Appellee was an employe of appellant in its factory, and was engaged in operating the truss machine. His employment began some time in April, 1894, and in November following he, while engaged in operating the said truss machine, was severely injured, by reason of a weight thereof falling upon his hand and wrist. To recover damages for the injury so sustained, through the alleged negligence of appellant, this suit was instituted. A trial in the lower court before a jury resulted in appellee being awarded damages in the sum of \$3,000, and, over appellant's motion for a new trial, judgment was rendered

thereon. The errors which appellant argue and rely upon for a reversal are (1) the overruling of its motion for a new trial, and (2) the overruling of its motion for judgment in its favor on the answers of the jury to interrogatories.

The first paragraph of the amended complaint charges in substance that the plaintiff sustained the injuries of which he complains, while he was engaged in operating, in the service of defendant, the truss machine in question, and that such injuries were caused by reason of the fact that appellant carelessly and negligently constructed and maintained the said machine in a defective and insecure condition; that appellant was negligent in attaching to said truss machine a hoop punching machine, and causing said punching machine to be run and operated at the same time that appellee was engaged in operating the truss machine; that the attaching of said punching machine caused the said truss machine to become insecure, and caused it to jerk, vibrate and shake, which effect upon said truss machine, followed by the fact that the hoop punching machine would become stalled in the hoop iron, and thereby jar and jerk the truss machine, whereby the operation of the latter became and was unsafe, by reason of which the frame of the said truss machine was not strong enough to stand the additional strain put thereon by attaching the punching machine thereto; that while appellee was operating the said truss machine, as aforesaid, and while the truss head weight thereof was suspended in its proper place, the dog or pawl which held the weight, as suspended, was jarred out of the ratchet, which secured the weight in its place, and the said weight was thereby caused to fall upon the plaintiff's right hand and wrist. The averments of the second paragraph of the amended complaint are similar in many respects to those of the first. It imputes negligence of the appellant in constructing the truss machine by which appellee was injured. The fact that the same

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was constructed out of old and worn material, and that it was so constructed as to be unsafe and insecure as therein mentioned, and that, after the erection and construction of said truss machine, the defendant did not at said time or at any time instruct plaintiff or give him warning of the dangerous condition of the dog or pawl which formed a part of said machine, or that the operation of said truss machine was dangerous or hazardous, etc. Each paragraph of the complaint discloses an absence of contributory negligence upon the part of the plaintiff, and avers knowledge of the defective machinery upon the part of appellant, and absence of knowledge of the unsafe condition of the machine on the part of appellee. In fact, no questions are raised as to the sufficiency of the complaint. The pleading is conceded to be good on demurrer.

It is insisted that the evidence clearly shows that the defects, if any, in the machine with which appellee was working, were visible to him and easily seen, and were known to him, or could have been known by the use of ordinary care and diligence. Counsel say: "While we enter upon this discussion knowing that this court never weighs conflicting evidence, we insist earnestly that, upon the point we argue, the evidence is not conflicting. If the power communicated to the punching machine from the truss machine was not sufficient to run the punching machine, and such attachment made appellee's work more dangerous, as alleged in the amended first paragraph of complaint, or if the attachments of the truss machine were old and worn, and, by reason thereof, his work thereby was made more hazardous, as averred in the amended second paragraph of complaint, and the appellee knew such facts, or could have known them by reasonable and ordinary diligence, then he cannot recover." There is evidence going to establish that appellee had only been engaged in operating the truss machine by which he was injured about eight or ten days prior to the accident; that he had no knowledge

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before that time of the dangerous or unsafe condition of the truss machine, or the part thereof by which he was injured. While, on the other hand, there is evidence to show that appellant had knowledge of the imperfections which rendered the machine dangerous or unsafe to be operated. The evidence further discloses that appellee was injured by reason of the truss head or weight of the truss machine falling upon his arm and wrist; that the falling of the truss head or weight was due in part, at least, to the action of the hoop punching machine, which, as shown, was attached to the truss machine, in failing properly to operate in doing its work, in connection with the latter machine, and partly due to the alleged defects in the dog or sliding rod of the truss machine. While the evidence in respect to some features of the case can not be said to be strong or of great weight, nevertheless we would not be justified in disturbing the judgment upon the ground that the evidence is insufficient, because there is evidence to sustain the general verdict and the material special findings of the jury in answer to interrogatories submitted to them.

The evidence is not of such a character that, upon the consideration thereof, we can affirm, as a matter of law, that appellee, as appellant claims, assumed the risk due to the dangerous or unsafe condition of the truss machine, within the rule asserted in *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561; *Wabash R. Co. v. Ray*, 152 Ind. 392.

In the appeal of *Mead v. Burk*, 156 Ind. 577, 582, the correct rule, and the one by which this court is controlled, is asserted as follows: "In order to justify this court in disturbing a judgment of the lower court in any case or proceeding, upon the evidence alone, the latter must be such as to raise a question of law, and not one merely of fact. *Lee v. State*, 156 Ind. 541, and cases there cited."

It is next contended that a new trial ought to have been granted because of newly discovered evidence. This ground for a new trial was supported by the affidavits of certain

persons, but these documents have not been incorporated into the record by a bill of exceptions or order of court as exacted by a familiar and well settled rule of appellate procedure, hence, by reason of their absence from the record they are of no avail in this appeal.

Appellant further complains of the rulings of the trial court in admitting, in behalf of appellee, the testimony of George Holloway, in respect to the condition of the dog and lever and other parts of the truss machine in question. This witness, as it appears, made an examination of the machine and its parts about one week after the occurrence of the accident, and testified to what he discovered by his examination in regard to the dog or pawl which held the weight up in the ratchet of the machine. Among other things, he testified that the dog was short and worn off at one of its corners, etc. It appears that, at the time the witness made his examination, the machine in controversy, together with all of its parts, remained practically unchanged from what its condition was at the time the accident occurred. No repairs had been made thereon, and nothing subsequent to the accident, up to the examination made by the witness, had transpired to change the condition of the machine from what it was at the time appellee sustained the injury in dispute. By reason of the unchanged condition of the machine at the time of the examination, the evidence in dispute would certainly serve or tend to show what its condition was at the time the accident occurred, hence, under the circumstances, the evidence was proper. While it is true that the examination of the machine was made by the witness subsequent to the time of the accident, still, what he discovered by means of the examination which he made, and to which he testified, necessarily, under the circumstances, related back, and tended to disclose the condition of the machine at the time appellee sustained his injury. *Hopkins v. Boyd*, 18 Ind. App. 63; *Salladay v. Town of Dodgeville*, 85 Wis. 318, 55 N. W. 696, 20 L.

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R. A. 541; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429.

The question in respect to the admissibility of the evidence in dispute, under the facts, does not fall within the rule enforced in *Terre Haute, etc., R. Co. v. Clem*, 123 Ind. 15, 7 L. R. A. 588, 18 Am. St. 303, and *Board, etc., v. Pearson*, 129 Ind. 456. These decisions have no application to the question as here involved.

Appellant complains because, as its counsel allege, the court sustained an objection of the appellee to the following question, which, as they assert, was propounded by appellant to appellee on his cross-examination, to wit: "Were you not, after the accident occurred, kept on the pay-rolls, and paid your wages by the defendant until about the commencement of this action?" It was disclosed that the question, as here set out, was embraced in appellant's motion for a new trial as one of its reasons, but the bill of exceptions discloses that no such question as the one set out in the motion for a new trial, and discussed by counsel for appellant in their brief, was propounded to appellee on his cross-examination and excluded by the court, hence, under the circumstances, for this reason, if for no other, appellant is not in a position to have the alleged erroneous ruling of the court in question reviewed in this appeal.

The special findings of the jury upon the interrogatories are in harmony with the general verdict, consequently appellant was not entitled to a judgment on these findings in its favor.

It is finally claimed that the damages are excessive. The jury saw appellee's injured hand and wrist, and heard all of the evidence in respect to the suffering to which he had been subjected on account of said injury, and the extent to which he had been disabled from pursuing his usual vocation, which was that of manual labor. Under all the circumstances in the case we discover nothing to induce us to believe that the jury in awarding the damages was in-

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fluenced by prejudice, passion, partiality, or corruption, hence we would not be justified in disturbing the judgment upon the ground of excessive damages. *Illinois, etc., R. Co. v. Cheek*, 152 Ind. 663.

We find no available error in the record, and the judgment is, therefore, affirmed.

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[No. 19,126. Filed December 20, 1901. Rehearing denied June 20, 1902.]

WILLS.—*Conditional Bequests.*—*Construction.*—A testator by the terms of his will gave certain property to his wife and provided for the payment of certain annuities to the wife and others until the charter, of a bank of which he was a stockholder should expire, when specific legacies should be paid them, if they be then living. The will further provided that should testator have no issue alive at the time of the expiration of the bank charter, the residue of his estate should go to certain named beneficiaries. Testator lived until after the expiration of the bank charter, and died without issue, leaving his wife surviving, who renounced the will. *Held*, that the will was not conditional, dependent upon the death of the testator before the expiration of the bank charter. pp. 107-116.

SAME.—*Residuary Legacies.*—*Construction.*—Where a will made certain specific bequests payable at the time of the expiration of a bank charter, and provided if testator had no child alive at that time "then in that case I give, devise, and bequeath, upon the expiration of the bank charter and the final settlement of my estate" all the rest and remainder of the property to those who may be then living of the persons named as residuary legatees, the legacies to the residuary legatees vested at the death of the testator. pp. 116, 117.

SAME.—*Perpetuities.*—An item in a will providing legacies in violation of the statute against perpetuities will not invalidate the entire will, where the legacies had lapsed by reason of the death of the legatees prior to the death of testator. p. 117.

SAME.—*Husband and Wife.*—*Renunciation by Wife.*—*Descent and Distribution.*—Where a man died testate without issue, leaving neither father nor mother, his widow, upon the renunciation of the will, is not entitled to all of his estate under §2651 Burns 1901, by virtue of the provision of §2648 Burns 1901, "that nothing in this act shall be construed to reduce the interest the law now gives a widow in the estate of her deceased husband." pp. 117-119.

From Lake Circuit Court; *J. H. Gillett*, Judge.

159	106
167	109
159	106
171	384

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Action by Louisa W. Murphey, against John Brown, executor of the will of William C. Murphey, deceased, and others, to contest the will. From a judgment for defendants on demurrer to complaint, plaintiff appeals. *Affirmed in part and reversed in part.*

M. E. Forkner, A. C. Harris and F. Winter, for appellant.
J. W. Youche, W. F. Jeffrey and E. D. Crumpacker, for appellees.

MONKS, J.—This action was brought by appellant to contest the will of her deceased husband. The testator left no children or their descendants, or father or mother, surviving him. Appellees, other than Brown, executor, are the persons named in the residuary clause in the will. Appellant, before the commencement of this action, renounced the will, in conformity with the statute. The complaint is in five paragraphs. In the first and second paragraphs it is sought to set aside the will and the first codicil and the probate thereof, on the ground that the will is conditional, and that the condition upon which it is to take effect never happened. The same relief is sought in the fifth paragraph, on the ground that the will is void, because in violation of the statute, §§8133, 8134 Burns 1901, against perpetuities. The fourth paragraph contests the second codicil, executed November 11, 1896, and the third codicil, executed September 28, 1897, on the grounds that the testator was of unsound mind when the same were executed, and that each of said codicils was unduly executed. The third paragraph proceeds upon the theory that the testator having died without issue, and leaving no father or mother surviving him, appellant, his widow, having renounced the will, is, under §2648 Burns 1901, entitled to all of his estate, notwithstanding the will. A demurrer for want of facts was sustained to each paragraph of the complaint, and, appellant refusing to plead further, judgment was rendered against her. The errors assigned call

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in question the action of the court in sustaining the demurrer to each paragraph of the complaint.

The questions involved only render it necessary to set out the disposing part of the will and the first codicil, which are as follows: "I, William C. Murphey, being of sound mind and memory, do make, publish and declare this to be my last will and testament. Item 1. I give, devise and bequeath unto my wife, Louisa W. Murphey, in lieu of all her interest as widow in any real estate of which I may die seized, and in lieu of any claim to or interest in my personal property, the house and lot in the town of Crown Point, in and upon which I now live, together with all the furniture and belongings in and about said house, including all utensils and all other articles of household property, either in or about said house, or in or about the barn on said lot, including also all live stock which I may own, but not including the paintings and pictures which were executed by my daughter, Anna Florence Murphey, deceased, all of which paintings and pictures, in case I die without issue, either living or posthumous, I give to Georgia Black, daughter of N. E. Black, of Indianapolis, Ind. Item 2. I direct that my executor, hereinafter named, shall immediately upon my death take possession, charge, and control of all my personal property, including all moneys, rights, choses in action, credits and effects which I may own, or in which I may have any interest at the time of my death. (Excepting, of course, all the personal property herein specifically given or bequeathed to other persons.) And he shall have the entire care and management thereof, but he shall not dispose of, but continue to hold, manage, and control my bank-stock and all my interests in the First National Bank of Crown Point, until the 11th day of September, 1894, when the charter of said bank expires; that he shall, as far as possible, pay my debts, if any, out of the proceeds of such personal property, other than said bank-stock, as shall come into his hands, but in case it is in-

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sufficient for such purpose and my executor can not arrange with my creditors, or any of them, to defer the payment of my debts (by paying reasonable interest) until after the expiration of the charter and liquidation of the business of said bank, or until such debts can be paid by him out of dividends which may come into his hands, and which may not be needed to pay the annual legacies herein provided for, then he shall convert enough of my bank-stock into cash to enable him to pay such creditors. And in case said bank should go into liquidation before the expiration of its charter in 1894, I direct my executor to invest the money, which he shall receive upon such liquidation, in other safe and profitable investments; and should the annual income of my stock in said bank ever become permanently less than would be the income from the money for which said bank-stock could be sold, if placed in other safe investments, then I authorize my executor, should he believe it to be to the best interest of my estate to do so, to dispose of my bank-stock and with the proceeds thereof, to make other safe investments, and out of the dividends and income, arising from my bank-stock and other personal property, my executor shall make the following payments: (1) He shall pay to my wife, Louisa W. Murphey, the sum of \$300 each year, to be paid quarterly; but should there hereafter be born to me, by my said wife, any child or children, then, in such case, the amount so to be paid to her each year shall be increased to \$600. (2) He shall pay to Joshua Holland, of New Castle, Indiana, the sum of \$500 each year, to be paid quarterly. (3) He shall pay to Nancy Holland, wife of said Joshua, the sum of \$500 each year to be paid quarterly. Item 3. At the time of the expiration of the charter of said bank, and after the liquidation of its affairs, I direct that out of the moneys which shall then be and come into the hands of my executor, he shall pay to my wife, Louisa W. Murphey, if she be then living, the sum of \$3,000; to the said Joshua Holland, if

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he be then living, the sum of \$2,000, and to said Nancy Holland, if she be then living, the sum of \$2,000. But nothing in this or any other item in this will shall be construed to require or authorize the payment of the foregoing \$7,000, so directed to be paid to my said wife and said Joshua and Nancy Holland, or any part of it, before the 11th day of September, 1894. Upon the payment to my said wife of the said \$3,000, or in case she should die before the time of making said payment, then at the time of her death, the quarterly payments to her, provided for in the preceding item of this will shall cease. And upon payments to said Joshua Holland of said \$2,000, or in case he should die before the time of making said payment, then at the time of his death the quarterly payments to him provided for in the preceding item of this will shall cease. And upon payment to said Nancy Holland of said \$2,000, or in case she should die before the time of making said payment, then at the time of her death the quarterly payments to her provided for in the preceding item of this will shall cease. Item 4. Should there be no issue of mine alive on the 11th day of September, 1894, then in that case, I give, devise, and bequeath upon the expiration of said bank charter and the final settlement of my estate and after all the debts and foregoing bequests and legacies are paid, all the rest and remainder of my property of whatever nature and wherever situated to those who may be then living of the following named persons, to be divided equally between them, to wit: My nieces, Virginia A. Murphey and Bertha Harvey, my brothers, Hiram B. Murphey, Robert P. Murphey, Eli C. Murphey, Miles E. Murphey and John F. Murphey, and my sisters, Eliza J. Elliott and Sophia C. Milligan; but should any of said persons, at the time of the final settlement of my estate, be dead, with lawful issue surviving them at the time of said final settlement, then such surviving issue shall take the portion which such deceased, if then living, would have

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taken. Item 5. Should there be born to me by my said wife, any child or children, either before or after my death, and should such child or children be alive at the time of the expiration of the charter of said bank in 1894, then, in that case, the devises and bequests made in item 4 of this will shall be considered revoked and annulled, and the persons in said item named and provided for shall take nothing, but all the property mentioned in said item 4 shall go to such child or children if living, at the time of the expiration of said bank charter. And in such case I direct that my executor shall continue to have and retain the possession, charge, management, and control of all said property, so in this item given to such child or children, and for this purpose he shall make such investments as shall be safe and remunerative of all moneys and property under his control, and shall quarterly, or oftener if necessary, pay to the proper person for the maintenance, education, and support of such child or children, as much of the income to be derived from such investments as shall be necessary, but the principal sum of such investments shall not be paid over by my executor until such child, or if there be more than one, until such children, respectively arrive at the age of thirty years. In case of the birth of any such child or children, the pictures and paintings executed by my deceased daughter, Anna Florence, mentioned in the first item of this will, shall go to such child or children."

First Codicil. "I, William C. Murphey, being of sound mind and memory, do make, publish, and declare the following codicil to my last will and testament, dated the 2d day of May, 1885. Item 1. I do hereby revoke item 7 and nominate and appoint as executor of my last will and testament, Geo. R. Murphey, of New Castle, Indiana, in place of Julius W. Youche. Item 2. It is my will that the name of my sister Mary M. Bond should appear in item 4, and I desire that she should be an equal heir or beneficiary with my other brothers and sisters in my estate.

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Item 3. I hereby direct my executor within one year from my death to pay \$1,000 to Rose Morris, now residing in Knightstown, Indiana." This codicil was executed August 7, 1891.

Appellant insists that said will "is conditional, dependent upon the death of the testator prior to September 11, 1894, and that the testator having lived beyond that day the condition upon which said will, and especially items two, three, and four were to take effect, has not happened, and that, therefore, the will as a whole, and especially the disposing part thereof as contained in said items, never took effect, and is void. It is true that a testator has the right to make a will to be operative only on the happening of a contingent event. *Lindsey v. Lindsey*, 45 Ind. 552; *Gibson v. Seymour*, 102 Ind. 485, 52 Am. Rep. 688; 1 Redfield, Law of Wills (4th ed.), 176, 180; Jarman, Wills (6th Am. ed. by Bigelow), 25, 26; Schouler, Wills (3d ed.), §§285-289; 29 Am. & Eng. Ency. Law, 130-134. But no will has ever been defeated by such condition, except where the intention of the testator that it should not operate clearly appeared from the language of the will. Redfield, Law of Wills (4th ed.), 177; Schouler, Wills (3d ed.), §286; *Cody v. Conly*, 27 Gratt. (Va.) 313, 320, 321; *French v. French*, 14 W. Va. 458, 499, and authorities cited. In *Cody v. Conly*, *supra*, on page 320, the court said: "The cases on this subject show, that while a person may, certainly, make a conditional will, his intention to do so must appear very clearly on the face of the will; and if such an intention do not so appear, the will must be regarded as unconditional."

Judge Redfield in his work on wills (4th ed.), volume 1, page 177, says: As questions of a very embarrassing nature often arise in regard to the proper testamentary character of papers left, in the form of a will, but expressed in terms more or less contingent, it must be borne in mind, that, in that class of instruments, the question must turn

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upon this point, whether the contingency is referred to as the occasion of making the will, or as the condition upon which the instrument is to become operative."

It is often the case that particular provisions of a will are made contingent to meet possible changes in the estate or the beneficiaries, but it is exceptional that contingencies are created that may result in partial intestacy. It was said by this court in *Spurgeon v. Scheible*, 43 Ind. 216, on page 220: "A construction which would result in partial intestacy is to be avoided, unless the language of the will is such as to compel such construction. *Cate v. Cranor*, 30 Ind. 292."

It is insisted by appellant that the testator in this case intended his will to be ineffectual unless he should die before September 11, 1894. No such condition is expressed in the instrument executed May 2, 1885. No provision in the will is expressly made to depend on such a contingency. Unless, therefore, it clearly appears from said instrument, taken as a whole, that it was the intention of the maker that it should not take effect unless he died before said date, the same must be held unconditional and valid. The provisions of the will must be such that they can not be executed after that date without antagonizing the testator's plain intention, or it can not be regarded as contingent. The testator having died after September 11, 1894, without issue, and appellant, his widow, having renounced the will, and the specific legatees having died under such circumstances that their several legacies lapsed, the residuary bequest contained in item four of the will is the only one left for enforcement. While the legal effect of a will must be determined according to the conditions as they exist at the death of the testator, all the provisions of the instrument, and the situation at the time of its execution, may be considered in determining his intention. The first clause of the will declared it to be the "last will and testament" of the testator, without any condition. The pro-

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visions in the first item in regard to the real and personal property therein described are unconditional and are as capable of enforcement now as if the testator had died before September 11, 1894. It is true that appellant renounced the will, and for that reason the first item can not affect her interest, but her renunciation can have no bearing on the testator's intention when the will was executed.

The third item of the codicil of August 7, 1891, three years before September 11, 1894, gave Rose Morris \$1,000, to be paid one year after the testator's death. The death of the legatee caused this bequest to lapse, but that event can not affect the testator's intention at the time he made the provision. This bequest is absolute and unconditional, and is in no way dependent on the expiration of the bank charter. We have these two items making absolute gifts of property, wholly independent of any other provisions in the will, capable of enforcement, showing conclusively the intention of the testator to die testate, so far at least as the property mentioned in said items is concerned, regardless of the date of his death. It is clear, therefore, that the testator intended said will to be final and not provisional. Did the testator intend any of the other provisions of said will to be conditional?

Looking at the will as a whole, we think it is clear that it was the purpose of the testator to dispose finally of all his property, but to postpone the distribution of that part not mentioned in item one until after the expiration of the bank charter, if he died before that time. Such intention made it necessary to provide some arrangement for its management and control until that date. No provision was made after that time, for the reason that it was then to be distributed to the beneficiaries. It nowhere appears by implication or otherwise that the bequests were to be invalid unless the testator died before the expiration of the bank charter, September 11, 1894. The testator may have believed he would die before the expiration of the bank charter, and

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that belief may have caused him to make the will, but it was not made a condition upon which its validity depended. He manifested some solicitude about the management of his bank stock, and gave particular directions respecting it, but that was only to provide for the possibility of his death before the expiration of the bank charter. As we have already shown, motives which prompt wills should never be confused with conditions vital to their validity. 1 Redfield, *Law of Wills* (4th ed.), 177; Schouler, *Wills* (3d ed.), §286; *Cody v. Conly*, 27 Gratt. (Va.) 313, 320, 321; *French v. French*, 14 W. Va. 458, 499.

No reason has been suggested why the testator should have desired that the question, whether the greater part of his large estate should go to his wife or his collateral kindred, should depend on whether he was alive on September 11, 1894. His purpose no doubt was to increase his estate from an investment he regarded as likely to be profitable, and, more securely to guard it, he put limitations on the power of the executor to sell the bank-stock; but this was a purely administrative matter, and could have had nothing to do with his desire concerning the ultimate disposition of his estate.

It is urged that the will should be held conditional, for the reason that any other construction would cut off a child of the testator, had one been born after September 11, 1894. Provision was made for the possibility of children, and it must be presumed that the testator made all the provision that seemed necessary to him. The presumptions of law are against conditions that will result in intestacy, and it is fair to presume, the contrary not appearing, that the testator had lived long enough with appellant when he made the will to know something about the probability of children, and that he knew or had reasonable grounds to believe that, according to the course of nature, if no children were born before the 11th day of September, 1894, over nine years after the date of the will, there never could be any.

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It is next insisted that the legacies to the collateral kindred, given by item four, were to vest absolutely on September 11, 1894, and that the class of beneficiaries should then be ascertained, and, as the testator was alive on that day, the legacies did not and could not then vest, and the class of beneficiaries could not at that time be ascertained. A will speaks from the death of the testator, and governs his estate as it then exists. It is true that estates can not vest, under a will, until the death of the testator, and if impossible conditions have been attached to them, they may never vest.

Item four provides that if there was no child alive at that time, "then in that case I give, devise and bequeath upon the expiration of the bank charter and the final settlement of my estate" all the rest and remainder of the property to those who may be then living of the persons named as residuary legatees. This required that the bank charter must have expired, and the estate must have been finally settled before the beneficiaries would be entitled to the possession of the property. The right to the legacies, however, vested in the residuary legatees on the death of the testator, whether that occurred before or after September 11, 1894. *Bruce v. Bissell*, 119 Ind. 525, 12 Am. St. 436; *Amos v. Amos*, 117 Ind. 37; *Aspy v. Lewis*, 152 Ind. 493, 496; *Heilman v. Heilman*, 129 Ind. 59. Nor were the beneficiaries to be ascertained on said date, as claimed by appellant.

A subsequent part of said item says, "but should any of said persons *at the time of the final settlement of my estate* be dead, with lawful issue surviving them at the time of the final settlement of my estate, then such surviving issue shall take the portion which such deceased, if then living, would have taken." Thus it appears from the express language of the will that the testator intended the estate to go to the beneficiaries living, not at the expiration of the bank charter, but at the final settlement of the estate, and if any

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should be dead leaving issue, such issue should succeed to the right of the ancestor.

Appellant next insists that the will is void, on the ground that it violates the statute against perpetuities. The law only looks to the situation at the time of the testator's death, to determine the effect of a will. A will may, therefore, be in violation of the statute against perpetuities when executed, and be void for that reason, when applied to the conditions then existing, but events may happen, before the death of the testator, that will remove all such objectionable features, and the estate created by the will at the death of the testator be valid. *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Gray, Perpetuities*, §231; 1 *Jarman, Wills* (5th Am. ed.), 519.

The testator having died without issue, after September 11, 1894, and the specific legacies having lapsed by reason of the death of such legatees, items one and four were the only effective provisions of said will at the death of the testator. It is clear that the provisions of item one are not in violation of the statute against perpetuities. Under item four, as we have shown, the rights of the residuary legatees vested on the death of the testator, and the possession thereof was postponed only until the debts and funeral expenses were paid. It is evident that this item does not violate said statute.

The next position of appellant is that the testator having died leaving neither descendants nor father nor mother, and appellant having renounced the will, takes all of his property by virtue of the act of 1891, being §2648 Burns 1901, §2488a Horner 1901, which reads as follows: "If a man die testate leaving a widow, one-third of his personal estate shall descend to said widow, subject, however, to its proportion of the debts of said decedent: Provided, however, that nothing in this act shall be construed to reduce the interest which the law now gives a widow in the estate of a deceased husband: And provided, further, that such widow

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may elect to take under the will of said decedent instead of this or any other law of descent of this State, which election shall be made within ninety days after said will has been admitted to probate in this State, and in the same manner as widows are now required by law to elect."

Prior to this act the husband could dispose of his entire personal estate by will, except the sum of \$500 given his widow by §2424 Burns 1901, §2269 R. S. 1881 and Horner 1901. In the absence of a will, however, her interest in the personal property in no case was less than one-third, after the payment of the debts, and if there were no children or their descendants, and no father or mother, the widow, in case of intestacy, took the whole estate under §2651 Burns 1901, §2490 R. S. 1881 and Horner 1901.

It is insisted by appellant that the provision in the act "that nothing in this act shall be construed to reduce the interest the law now gives the widow in the estate of her deceased husband," gives the entire estate to the widow, as against her husband's will, when she would have received it under the last named section without a will. We can not agree with appellant in this contention. The proviso grants nothing, it merely limits the operation of the new act upon laws in force when it was enacted. *City of Chicago v. Phoenix Ins. Co.*, 126 Ill. 276, 280.

It follows from what we have said that the court did not err in sustaining the demurrer to the first, second, third, and fifth paragraphs of the complaint.

The court, however, erred in sustaining the demurrer to the fourth paragraph of complaint. That paragraph alleges that the testator was of unsound mind when he executed the codicils of November 10, 1891, and September 28, 1897, and that each of said codicils was unduly executed. These grounds of contest were sufficient and properly stated.

The judgment is affirmed as to the first, second, third, and fifth paragraphs of complaint, and reversed as to the fourth paragraph, with instructions to overrule the de-

murrer thereto, and for further proceedings not inconsistent with this opinion.

STATE, EX REL. WARREN ET AL., v. OGAN ET AL.

159 119
171 273

[No. 19,502. Filed March 13, 1902. Rehearing denied June 20, 1902.]

SCHOOLS.—*Election of School Trustees.*—*Municipal Corporations.*—The provision of §5915 Burns 1901, that the common council of each city and the board of trustees of each incorporated town shall at their first regular meeting in the month of June elect three school trustees does not, in terms, apply to cities thereafter created. pp. 119-125.

SAME.—*Incorporation of City.*—*Vacation of Offices of School Trustees.*—*Municipal Corporations.*—The incorporation of a town as a city does not vacate the offices of school trustees thereof. pp. 124, 125.

SAME.—*School Trustees.*—*Election.*—*Newly Incorporated City.*—Where the mayor and common council of a newly incorporated city elected three members of the school board instead of one, according to law, without in any way designating which one was elected for three years, and continuously refused to appoint one trustee or to make any other appointment, no one of them was thereby legally elected. pp. 126, 127.

From Fountain Circuit Court; *Jere West*, Special Judge.

Quo warranto by the State on the relation of Omar P. Warren and another against George Ogan and others to try the title to the offices of school trustees of the city of Veedersburg. From a judgment sustaining a demurrer to the information, relators appeal. *Reversed.*

C. M. McCabe and *L. Nebeker*, for appellants.

W. W. Thornton, *D. F. Lemmon*, *I. E. Schoonover*, *V. E. Livengood* and *A. T. Livengood*, for appellees.

GILLET, J.—The important question in this case is, can the common council of a newly incorporated city at once elect three trustees of the school city, on the theory that the offices of trustees of the former school town have, by the act of incorporation, ceased to exist?

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The determination of this question depends upon the proper construction of §4 of the act of March 6, 1865, (§5914 Burns 1901, §4438 Horner 1901); and §5 of the act of March 12, 1875, §5915 Burns 1901, §4439 Horner 1901. The material portions of said §4 read as follows: "Each civil township and each incorporated town or city in the several counties of the State is hereby declared a distinct municipal corporation for school purposes, by the name and style of the civil township, town or city corporation respectively, and by such name may contract and be contracted with, sue and be sued, in any court having competent jurisdiction." The provisions of said §5, so far as material here, are as follows: "The common council of each city and the board of trustees of each incorporated town of this State, shall, at their first regular meeting in the month of June, elect three school trustees (who shall hold their office one, two, and three years respectively, as said trustees shall determine by lot at the time of their organization), and, annually thereafter, shall elect one school trustee, who shall hold his office for three years. Said trustees shall constitute the school board of the city or town; * * * All vacancies that may occur in said board of school trustees shall be filled by the common council of the city or board of trustees of the town; but such election to fill a vacancy shall only be for the unexpired term. * * * Said trustees shall receive for their services such compensation as the common council of the city or the board of trustees of the town may deem just; which compensation shall be paid from the special school revenue of the city or town." Although this section is an amendment of an act passed in 1873, yet it is, in reality, a substitute for §5 of said act of March 6, 1865.

The act of March 12, 1875, does not, in terms, apply to cities thereafter created, because it has been held by this court that the month of June referred to in said act relates to the June immediately following the enactment of the

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statute. *Blakemore v. Dolan*, 50 Ind. 194. It is only *ex necessitate* that the statute can be held to apply to towns thereafter created. In this connection it is important to note that there is no provision of law whereby the inhabitants of suburban lands may incorporate the same as a city. Such inhabitants may create a town, and such town may, if it has the requisite population, become a city. It cannot be held that the first election provided for by the act of 1875 applies, from the necessity of the case, to cities thereafter created, if it can reasonably be held that the terms of office of the trustees of the school town corporation extend into the period after the city has been created. This brings us to a consideration of the character of school corporations.

It will be observed that the statute that establishes school corporations provides that they shall be "distinct municipal corporations for school purposes." The word "distinct," as used in the statute, is used to differentiate the school corporation from the civil corporation, and not to separate school corporations into distinct classes. *McLaughlin v. Shelby Tp.*, 52 Ind. 114; *School Town of Princeton v. Gebhart*, 61 Ind. 187; *Utica Tp. v. Miller*, 62 Ind. 230; *Braden v. Leibenguth*, 126 Ind. 336; *Wilcox v. City of Bluffton*, 153 Ind. 267. As said by this court in *McLaughlin v. Shelby Tp.*, *supra*, at page 117: "The language is 'each civil township and each incorporated town or city,' etc., 'is hereby declared a distinct municipal corporation for school purposes,' etc. Distinct from what? Clearly from the corporations of the civil townships, towns and cities. Language could scarcely make it plainer."

As will hereafter appear, progress will be made in the solution of the question before us by considering the character of school corporations in their relation to the State. The Constitution does not direct the General Assembly to provide for the organization of the common schools, but it directs that body to devise "a *system* of common schools."

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Art. 8, §1. The word "system" is thus defined by the Encyclopaedic Dictionary: "A plan or scheme according to which things are connected or combined into a whole; an assemblage of facts, or of principles and conclusions, scientifically arranged or disposed according to certain mutual relations, so as to form a complete whole: as a system of philosophy, a system of government, etc." Section 8 of article 8 of the Constitution directs that: "The General Assembly shall provide for the election, by the voters of the State, of a State Superintendent of Public Instruction, who shall hold his office for two years, and whose duties and compensation shall be prescribed by law." A system of school government in which the cap-sheaf is a state officer, having authority more or less broad, as the legislature may provide, but which, of necessity, reaches down to and affects the schools themselves, is a centralized, and not a localized, form of school government. Judge Cooley, in his great chapter on decentralization, recognizes the distinction between that class of public corporations where the people voluntarily take upon themselves the corporate function, and that class of *quasi* corporations that exist under the general laws of the state apportioning the territory of the state into political divisions for convenience of government, and requiring of the people residing within those divisions the performance of certain public duties as a part of the machinery of the state. Whether the inhabitants, says that learned author, "shall assume those duties or exercise those powers, the people of the political divisions are not allowed the privilege of choice; the legislature assumes this division of the state to be essential in republican government, and the duties are imposed as a part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional liberty." Cooley's Const. Lim. (5th ed.), 240. The following quotation from the case of *City of Lafayette v. Jenners*, 10 Ind. 70, 77, is apropos here: "And we have seen that common schools as

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a whole, are made a State institution—a system coextensive with the State, embracing within it every citizen, every foot of territory, and all the taxable property in the State.” “Essentially and intrinsically,” said this court in *State v. Haworth*, 122 Ind. 462, 465, 7 L. R. A. 240, “the schools in which are educated and trained the children who are to become the rulers of the commonwealth are matters of State, and not of local jurisdiction. In such matters the State is a unit, and the legislature the source of power. The authority over schools and school affairs is not necessarily a distributive one to be exercised by local instrumentalities; but, on the contrary, it is a central power, residing in the legislature of the State. It is for the law making power to determine whether the authority shall be exercised by a state board of education, or distributed to county, township, or city organizations throughout the State.” We are not called upon in this case to determine all of the consequences that may result from creating two governmental corporations in the same territory. The question before us is a statutory question. We only concern ourselves to apprehend the will of the General Assembly, as it cannot admit of doubt that its power in this matter is plenary. Our purpose in discussing the character of school corporations is to make apparent the fact that they can stand alone; that the destruction of the civil corporation does not work a dissolution of the school corporation because of any necessary interdependence of the two.

As the June referred to in the statute was June, 1875, we must look outside the letter of the statute for our guidance in this case. Are there good reasons for holding that the General Assembly did not intend that the incorporation of the city should vacate the offices of the school trustees? Before the incorporation of the city, the town trustees, in whom the General Assembly has lodged the power of appointment, have performed their duty by appointing school trustees, and why should a change in situation, that

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would seem at most to have but lodged the power of appointment elsewhere, have any effect upon the officers of the corporation, so long as there is no occasion for a new appointment? But there are positive reasons why the General Assembly could not have intended to vacate the offices of the school corporation. It has been held that the legislature has manifested its purpose in this and similar statutes to keep experienced men in office, by maintaining a rotation in the expiration of their terms. *Sackett v. State, ex rel.*, 74 Ind. 486; *Bell v. State, ex rel.*, 129 Ind. 1. As shown, we may escape the effect of the ruling that the date of election is June, 1875, on the ground of necessity, where towns were thereafter incorporated, but there is no such necessity as applied to cities, because it can be held that the school town trustees hold over. It would be contrary to the legislative policy to permit a common council to break into this order by putting three new members into office. It cannot be claimed that the express words of the statute authorize the filling of the offices of school city trustees on the theory that the offices are vacant, because the statute also provides that "such election to fill a vacancy shall only be for the unexpired term."

An even more important reason occurs to us for holding that the General Assembly did not intend to cut off the school town trustees, and that is that under existing legislation there would be an interregnum if the school town trustees did not hold over. When a town has taken the necessary preliminary steps to become a city, and the proposition has received the assent of a majority of the voters, and a certificate thereof has been made and recorded, as provided by statute, the statute declares that such town "shall thereafter be deemed an incorporated city, with the powers and franchises thereof." §3467 Burns 1901, §3036 Horner 1901. By the next section, the town trustees are directed to, within five days, divide the city into wards, and to publish and post a ten days' notice of election. We are not

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required to hold in this case that in the civil city there is an absolute interregnum between the recording of the result of the vote to incorporate and the time that the new officers are elected. Indeed, the last section of the statute would seem to afford a fair basis for the position that the town trustees are authorized to maintain a provisional government in the interim, but in the case of a school city there is no such statute, and, as the school city is brought into existence *eo instanti*, the city is incorporated, we can not see how the interruption of the government of the school corporation can be avoided, unless we hold that the terms of office of the school town trustees extend into the period after the city, according to the express words of the statute, has been created, and if we admit that they hold ten days into such period, then we must concede that the incorporation of the city does not cut short their terms of office.

We can think of but one reason that can be advanced why they should not so hold, and that is that the name of the school corporation has changed, for it is thereafter to be known as a school city. But that consideration can furnish but a lame reason for holding that the officers of the school corporation do not continue in office. The old corporation and the new are governmental subdivisions of the State, their boundaries and their people are the same, they are created for the same purpose, they have the same property, and the same obligations, if any, their officers have the same measure of authority, and their bonds run to the same obligee. To contend that the change of the word "town" to "city" creates a new corporation, and thereby vacates the offices of those appointed to administer the corporate affairs, would have as little basis in reason as the claim that a judicial order changing the name of a private corporation would work an amotion of its officers.

It was suggested in argument that if we hold that the school town trustees hold over after the town incorporates as

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a city, then we must also hold that, if the citizens of a town voted to abandon its corporate capacity, the school town trustees would hold office under the school township. *Non constat.* This whole matter is a legislative one, and, in the latter case, where we find that the boundary lines of the school town have been obliterated, and where we find that the statute contemplates that but one trustee shall administer the affairs of the school township, we are justified in saying that in such case the General Assembly has manifested a contrary intent.

In holding that the school town trustees hold over when the town becomes a city, it is our judgment that we carry out the policy of the legislative department, in so far as it has been expressed, and it is also our opinion that we are authorized to indulge the presumption that it was the legislative purpose that school town trustees should hold over, because we may presume that it was intended to accomplish the change in the appointing power with the minimum amount of effect upon a corporation that the statute has provided shall be a "distinct municipal corporation for school purposes." "Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship or injustice; to favor public convenience, and to oppose all prejudice to public interests. The considerations of evil and hardship may properly exert an influence in giving a construction to a statute when its language is ambiguous or uncertain and doubtful." Sutherland, Stat. Con., §34.

The information alleges that in the month of June, 1900, the mayor and common council of the city of Veedersburg held a meeting "for the purpose of filling the office of school trustee, and thereupon announced and declared, and entered of record, that the defendants [three in number] were elected and appointed as members of said school board, and as the school trustees of said school city, for the terms of one, two, and three years, without fixing or in any way

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designating which of the defendants were elected for the term of three years, * * * and said mayor and council have continually refused and still refuse to appoint one trustee, or to make any other appointment than the one so heretofore made." Counsel for appellees insist that, according to the theory of the prayer of the information, the court is called on to determine which one of the defendants is elected, and which two of them should be removed. The theory of a complaint is to be determined by its averments, and not by its prayer. *McGuffey v. McClain*, 130 Ind. 327; *Hoosier Stone Co. v. Louisville, etc., R. Co.*, 131 Ind. 575. While it may be possible that the three defendants, whom the information alleges have qualified and organized as the school board of said city, may, as against third persons, be regarded as *de facto* trustees, a point that we do not determine, yet we are constrained to hold that, assuming the averments of the information to be true, no one of them was elected, because it can not be determined which one was elected.

Judgment reversed, with instructions to the court below to overrule the demurrer to the information, and for further proceedings not inconsistent with this opinion.

**MALOTT, RECEIVER OF THE TERRE HAUTE AND
INDIANAPOLIS RAILROAD COMPANY, v.
HAWKINS, ADMINISTRATRIX.**

[No. 19,532. Filed March 21, 1902. Rehearing denied June 20, 1902.]

RECEIVERS.—*Actions Against.*—*Leave of Court.*—Under act of congress, 25 U. S. Stat., p. 436, the receiver of a railroad company appointed by the United States Court may be sued for damages for negligent killing in a state court without leave of the court making the appointment. pp. 130, 131.

RAILROADS.—*Highway Crossings.*—*Contributory Negligence.*—*Instructions.*—The law has marked out with such precision the quantum of care that a traveler must exercise in passing over a crossing that the court in instructing the jury should not stop with the generality that such person must use ordinary care for his own

159	127
180	152
159	127
4162	248

159	127
4163	615

159	127
164	374

159	127
1108	252

159	127
169	460

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safety, but it should instruct the jury as to some, at least, of the duties of the traveler. p. 134.

RAILROADS.—Highway Crossings.—Degree of Care Required of Traveler.—One about to cross a railroad grade crossing, except where a flag-man signals him to cross, must look and listen for approaching trains, and, under exceptional circumstances, stop. p. 134.

SAME.—Highway Crossings.—Duty to Look and Listen.—Presumption.—The law will presume that one about to cross a railroad at grade actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened. p. 134.

SAME.—Highway Crossings.—Selection of Position to Look and Listen.—A traveler approaching a railroad crossing is required to exercise ordinary care to select a place to look and listen for approaching trains where the acts of looking and listening will be reasonably effective. pp. 134, 135.

SAME.—Highway Crossings.—Reciprocal Rights.—Where a traveler at a public crossing has vigilantly used his senses to avoid danger, and is unable to see or hear an approaching train, he may, while still exercising due care, assume that the company will not omit to give the usual signal, if a train is approaching, especially the statutory signals. p. 135.

CONTRIBUTORY NEGLIGENCE.—Mixed Question of Law and Fact.—Railroad Crossings.—While §359a Burns 1901, placing the burden of proving contributory negligence in personal injury cases upon the defendant does not abate the legal requirements as to the care that a traveler crossing a railroad track must use, nor change the rule that it is presumed that the traveler saw and heard, or was heedless of that which as an ordinarily prudent man, he ought to have taken notice of; but where the question as to contributory negligence stands as a mixed question of law and fact, the statute may have the effect of requiring such question to be submitted to the jury. pp. 135-137.

APPEAL AND ERROR.—Instructions.—Exception.—An exception to an instruction by a written indorsement on the margin thereof in the words: "Given and excepted to at the time by the defendant," signed by the judge, is not a sufficient compliance with §544 Burns 1901 providing the manner of reserving exceptions to the giving or refusing of instructions without a bill of exceptions, where the indorsement was not dated. pp. 137-139.

From Marion Superior Court; *J. M. Leathers*, Judge.

Action by Elizabeth Hawkins, administratrix of the estate of Addis Hawkins, deceased, against Volney T. Malott, as receiver of the Terre Haute and Indianapolis Railroad Company for damages for the negligent killing

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of decedent. From a judgment for plaintiff, defendant appeals. *Affirmed.*

J. G. Williams and *D. P. Williams*, for appellant.

A. C. Ayres, *A. Q. Jones*, *J. E. Hollett* and *C. A. Dryer*, for appellee.

GILLETT, J.—The above named appellee commenced this action in the court below against the above named appellant to recover damages for the alleged negligent killing of her decedent. The appellee recovered a judgment upon her complaint, and from said judgment the appellant prosecutes this appeal.

In addition to the general denial, the defendant filed a special answer by way of a plea to the jurisdiction of said court. A demurrer was sustained to the latter paragraph, to which ruling the appellant duly reserved an exception, and assigns error upon the ruling. This paragraph of answer alleges, in substance, that the sole purpose of the action is the recovery of a judgment against a fund in appellant's custody, as receiver, and the payment of such judgment out of such fund; that such fund came into his custody by virtue of a decree, duly entered by the circuit court of the United States for the district of Indiana, appointing him receiver of said company, an insolvent corporation, in an action having for its ultimate purpose the marshaling of its assets and liabilities, the sale of such assets, and the distribution of the proceeds thereof, and the payment of its liabilities; that he is in custody and control of all of the property and assets of said company, and is administering the same, solely under the orders and decrees of said court, and that the appellee brought and was prosecuting this action wholly without leave of the court which appointed him, and that appellant, as said receiver, claimed immunity for such fund from any interference by the Marion Superior Court.

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In the year 1887, congress enacted a statute which provides as follows: "That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice." 25 U. S. Stat., p. 436. We do not understand that the question now before us is substantially different from the question determined by this court adversely to appellant in the case of *Malott v. Shimer*, 153 Ind. 35, 74 Am. St. 278, except that the question was there raised by demurrer, instead of by answer. Since that case was decided, however, the whole matter has been put at rest by the decision in the case of *Gableman v. Peoria, etc., R. Co.*, 179 U. S. 335, 338, 21 Sup. Ct. 171, 45 L. Ed. 220. It was there said: "This act abrogated the rule that a receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts, and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the federal court. * * * As, however, the receiver, as the officer of the court, holds the property for the benefit of all who have an interest in it, and is not to be interefered with in its administration and disposal by the judgment or process of another court, the closing clause of the section, out of abundant caution, provides that when the receiver is sued, without leave, 'such suit shall be subject to the general equity jurisdiction of the court in which said receiver or manager was appointed, so far as the same

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shall be necessary to the ends of justice.' Of course it devolves on the court in possession of the property or funds out of which judgments against its receiver must be paid to adjust the equities between all parties, and to determine the time and manner of payment of judgment creditors necessarily applying for satisfaction from assets so held to the court that holds them. But, as we observed in *Texas, etc., R. Co. v. Johnson*, 151 U. S. 81, 103, 14 Sup. Ct. 250, 38 L. Ed. 81, 'the right to sue without resorting to the appointing court, which involves the right to obtain judgment, can not be assumed to have been rendered practically valueless by this further provision in the same section of the statute which granted it.' " The demurrer to the second paragraph of answer was properly sustained.

Under an assignment of error that the court below erred in overruling appellant's motion for a new trial, the appellant next urges that Addis Hawkins, for whose death this action was brought, was so manifestly guilty of contributory negligence that the appellant's request for a peremptory instruction to the jury to find in his favor should have been granted. Looked at in a light most favorable to appellee, as it is our duty to do on appeal, the evidence shows the following facts and circumstances relative to the death of appellee's decedent: Said decedent and his son, a young man, left their home, which was situate a few miles from the city of Indianapolis, to go to said city, shortly after five o'clock, on the morning of February 9, 1898. They drove one horse attached to a covered buggy. The horse was a slow traveler, and the buggy rattled. The morning was dark and foggy, and it had been raining. Their road to the city was along a highway, termed the Morris pike. This road extended east and west, and it was crossed at what was called "Wright's crossing" by said railroad. The lines of said railroad and of said highway, as they extend to said crossing, constitute rather an acute angle. Decedent and his son, in proceeding to said city, were required to travel

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east along said highway, and close to the north rail of said railroad, until the railroad and highway intersected at said crossing. To the west of said crossing the highway had been worked and traveled to a width of sixteen or eighteen feet. The railroad company, as the second comer, had undertaken to discharge its statutory duty of restoring the highway, by putting planks across it at the intersection to a width of ten or twelve feet. It had, however, put said planking twenty and one-half feet farther east than was proper, in view of the intersection of the highway and the railroad, with the result that a person crossing the railroad at that point would require a few more seconds to cross the right of way than would be required if the highway had been properly restored. Decedent and his son reached said crossing about 5:35 a. m. They were last seen in life by a witness named Smith, who testified that they passed him on the highway, and that when they were seventy or seventy-five feet from the crossing and twenty-five feet from the north rail of the railroad track, he noticed that the buggy was stopped, and he saw the light cap of the younger man above the top of the buggy cover. The witness was permitted, without objection, to express the opinion that he thought they were looking for a train. A passenger train was in point of fact coming from the west. There is evidence that it approached and passed over said crossing at the rate of sixty-five miles an hour; that the locomotive had no headlight, and that the statutory signals were not given. The witness whose testimony we have mentioned above, who claims to have been afoot, further testified that when he saw the younger man looking, as he supposed, for a train, he also looked in the same direction, and also listened, but that he did not hear or see any train at the time; that before he had taken many more steps he heard the train coming, and, looking around, was able to see the front part and the side of the locomotive and "a little bit of light in the coaches, shining out like." One witness, who was at work

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at the time, testified that it was so dark that a horse and vehicle could not be seen at a greater distance than thirty feet. A number of other witnesses testify to seeing the lights in the windows of the coaches, but all of them, unless it be the witness whom the buggy passed, occupied positions where they could better observe said lights than the decedent and his son, because they were at points farther from the track. It also appears that a number of said witnesses heard the noise of said train. The wind was blowing from the northeast. Both the decedent and his son possessed the usual human capacity to see and hear. The track was straight. There was a heavy down grade to the east, and a locomotive headlight could be seen from the crossing for the distance of a mile to the west thereof, and we think that there was evidence from which the jury might have inferred that a headlight could have been seen for that distance to the west, at the point where the younger man apparently looked back. The locomotive collided with the conveyance at the crossing. Both men and the horse were killed by such collision, and their bodies were found at considerable distances to the east of the crossing, those of the two men on one side of the track, and that of the horse on the other.

There is very little of difficulty in the determination of the law in such a case as this. The difficulty arises in the application of the law to the facts. The rights of a traveler and of a railway company, at a point where a railway and a highway intersect, have been said to be "mutual, coëxtensive, and in all respects reciprocal." Rorer, Railroads, 531; Elliott, Railroads, §1153. But owing to the momentum of trains, the confinement of their movement to a track, and the necessities of railway traffic, the traveler must yield precedence in the right of passage. *Ohio, etc., R. Co. v. Walker*, 113 Ind. 196, 3 Am. St. 638, and cases cited.

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A grade crossing is in itself, to a person acquainted with its existence and about to pass over the same, a warning of danger, and as a result the law has marked out the *quantum* of care that he must exercise with more precision than would be possible in most cases where the question of contributory negligence is involved. In cases of this character, a trial court should not, in instructing the jury upon the duty of the person injured or killed, stop with the generality that such person was required to use ordinary care for his own safety, but it should instruct the jury as to some, at least, of the duties of a person about to cross a railway track upon a highway.

The statement, so frequently found in the authorities, that a traveler must look and listen, is one that especially applies to a case of this kind. *Cincinnati, etc., R. Co. v. Howard*, 124 Ind. 280, 8 L. R. A. 593, 19 Am. St. 96; *Louisville, etc., R. Co. v. Stommel*, 126 Ind. 35; *Smith v. Wabash R. Co.*, 141 Ind. 92; *Engler v. Ohio, etc., R. Co.*, 142 Ind. 618; *Oleson v. Lake Shore, etc., R. Co.*, 143 Ind. 405, 32 L. R. A. 149; *Lake Erie, etc., R. Co. v. Stick*, 143 Ind. 449; *Pittsburgh, etc., R. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. 377. Exceptional circumstances may also require him to stop, although this proposition generally presents itself as a mixed question of law and fact. *Elliott, Railroads*, §1167; *Cincinnati, etc., R. Co. v. Howard*, *supra*; *Louisville, etc., R. Co. v. Stommel*, *supra*; *Chicago, etc., R. Co. v. Thomas*, 155 Ind. 634.

As a corollary of the proposition that the traveler must look and listen, it follows that "the law will assume that such person actually saw what he could have seen, if he had looked, and heard what he could have heard, if he had listened." *Pittsburgh, etc., R. Co. v. Frazee*, *supra*. The traveler is also required to exercise ordinary care to select a place to look and listen where the acts of looking and listening will be reasonably effective. *Elliott, Railroads*, §1166. It is not ordinarily possible, however, to

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affirm, as a matter of law, the precise number of feet from the crossing at which the traveler must look and listen, the underlying test being, did the traveler exercise ordinary care, in view of the danger, in selecting the place. *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426; *Chicago, etc., R. Co. v. Thomas, supra*.

A further proposition, based on the reciprocal rights of the railway company and a traveler at a public crossing, is that after a traveler has vigilantly used his senses to avoid danger, as stated above, and is unable to see or hear any approaching train, he may, while still exercising due care, assume that the company will not omit to give the usual, and especially the statutory signals, if a train is really approaching. *Elliott, Railroads*, §1158; *Pittsburgh, etc., R. Co. v. Martin*, 82 Ind. 476; *Chicago, etc., R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761; *Terre Haute, etc., R. Co. v. Brunker*, 128 Ind. 542; *Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357; *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524. The omission to give signals may, therefore, be an element in determining the question of contributory negligence.

Where the facts and circumstances surrounding a particular case are such as to warrant different inferences, so that an impartial, sensible man may draw the inference and conclusion that the injured person was guilty of contributory negligence, while another man, equally sensible and impartial, might draw a different conclusion, such question is one that, under appropriate instructions as to the law, should be submitted to a jury. *Baltimore, etc., R. Co. v. Walborn*, 127 Ind. 142; *Mann v. Belt R. Co.*, 128 Ind. 138; *Cleveland, etc., R. Co. v. Harrington, supra*; *Young v. Citizens St. R. Co.*, 148 Ind. 54; *Louisville, etc., R. Co. v. Williams*, 20 Ind. App. 576.

One more proposition of law remains to be considered in applying the law to the question in hand, and that is the effect of the act of February 17, 1899 (§359a Burns 1901,

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§284a Horner 1901), relative to the burden of proof as to contributory negligence in cases of death or injuries to persons, occasioned by negligence. Appellant's counsel submits a learned argument upon the proposition that said act is unconstitutional, but in view of the recent decisions of this court to the contrary, we do not feel called upon to discuss the question. See *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 414; *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690. This statute can not be held to abate the legal requirements as to the care that a traveler crossing a railroad track must use, and it does not change the rule that it is presumed that the traveler saw and heard, or was heedless of, that which, as an ordinarily prudent man, he ought to have taken notice of, but it is evident that in many cases where the question as to contributory negligence stands as a mixed question of law and fact, the statute may have an important bearing upon the legal aspect of such cases. As applied to this case, it is evident that the statute is a very considerable factor. As stated before, there is evidence that the buggy was stopped, and it may be inferred that the son looked and listened when he and his father were from seventy to seventy-five feet from the crossing and twenty-five feet from the track. They drove on, and after the time that the witness Smith ceased to hear the buggy rattling, as it went east, the line of continuity is broken until the men are found dead upon the railroad right of way.

Can there be a recovery by the appellee in this case, under the rules of law above stated? We are of the opinion that the evidence warranted such a result, in view of the burden of proof being upon the appellant on the question of contributory negligence. These men were compelled to drive almost in the same direction that the train was going, and for a number of feet they were compelled to drive in very close proximity to the track; their buggy cover was up; it was dark and foggy, and their buggy rattled. It is not difficult to understand how they might have stopped and looked

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and listened at a proper distance, and placing some degree of reliance upon the fact that they did not see a headlight, and did not hear the whistle sounded between eighty and one hundred rods from the crossing, and did not hear the bell rung, as it is required to be, from the time the whistle should have been sounded until the crossing was reached, that they might have, while exercising due vigilance, been deceived by the negligent omission of the company, and been overtaken upon the crossing by this train that, if it was running at the rate of sixty-five miles per hour, was running ninety-five and one-third feet per second, or a quarter of a mile in less than fourteen seconds. We have not failed to consider the fact that we have held that we judicially know that trains create no inconsiderable noise in their movement, and that it is evident that for some considerable distance such noise can be heard, but in view of the character of the approach to the crossing, occasioning a few seconds' delay when decedent and his son could not well stop and listen or readily turn back, and in view of the swift approach of the train, with the direction of the wind unfavorable for hearing, we have concluded that the question whether the decedent ought to have heard the approach of the train in time to have avoided the collision was a question that was properly submitted to the jury.

We do not feel justified in discussing at length whether the evidence sustained the complaint in its general scope and theory, if construed according to the rule laid down in *Terre Haute, etc., R. Co. v. McCorkle*, 140 Ind. 613. There is a marked distinction between the complaint in that case and in this. In our judgment there is evidence sufficient to support the verdict.

Counsel for appellant urge that the trial court erred in giving each of a number of instructions. It is the claim of opposite counsel that the exceptions to the instructions are not in the record. The method pursued by the appellant in his effort to reserve such exceptions was to have the trial

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judge indorse upon the margin of each instruction the words: "Given and excepted to at the time by the defendant. James M. Leathers, Judge." The statute upon the reserving of exceptions to the giving or refusal of instructions, without a bill of exceptions, is as follows: "A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write on the margin or at the close of each instruction 'refused, and excepted to,' or 'given, and excepted to;' which memorandum shall be signed by the judge, and dated." §544 Burns 1901, §535 Horner 1901. In *Behymer v. State*, 95 Ind. 140, 142, it was said of this section of the code: "Under this section, the date is quite as material as the signature of the judge, *first*, because they are both required by the statute; and, *second*, because it is the date that shows when the exception was taken. It takes the place of the statement in the bill of exceptions, that the exception was taken at the time." In *Roose v. Roose*, 145 Ind. 162, 164, it was said: "The instructions given by the court are all open to the same objection. The only statement to show that exceptions were taken to the latter, is the following at the close thereof: 'To the giving of each of the above instructions, severally, plaintiff, at the time, duly excepted.' This was not in compliance with the requirements of the section of the code to which we have referred, so as to be available to the complaining party. The exception must be noted, either on the margin or at the close of each instruction, which written notation must be dated and signed by the trial judge. This the statute requires in plain imperative terms not open to construction." The statute has provided a most simple method of reserving exceptions to instructions given or refused, but the requirement of the statute that the marginal notation of the judge shall be dated is not open to construction. We have no disposition to be unduly technical, but we believe that this statute should be preserved in its simplicity, and that

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when once we recognize that there is some equivalent method of reserving exceptions under this section of the code, we will find a multitude of border line questions springing up that will unsettle a matter of practice that is now so plain that the practitioner need not err therein.

We have now considered the various questions presented by the record in this cause, and we find no error.

Judgment affirmed.

FISHER ET AL., TRUSTEES, v. BROWER ET AL.

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1159	537

[No. 19,612. Filed June 24, 1902.]

SCHOOLS.—*State University.—Endowment Fund.*—The permanent endowment fund of the State University is entitled to the same constitutional and statutory protection as is accorded to public school funds. pp. 141-144.

SAME.—*State's Trust Fund.—Security.—Power of Legislature.*—For the protection of the State's trust fund, the legislature has power to make the security therefor paramount to tax and all other liens created or authorized by the State. p. 145.

SAME.—*Mortgage to Secure State University Endowment Fund.—Sale.—Priority.*—The purchaser of real estate, at the permanent endowment fund mortgage sale by the State Auditor, takes the real estate free from tax and assessment liens incurred after the execution of and during the time the land was under the mortgage. pp. 144-146.

NOTICE.—*Publication.*—A publication of notice of sale for nine successive weeks in a weekly newspaper, said period of nine weeks terminating two days before the sale, is sufficient compliance with §6109 Burns 1901. pp. 146, 147.

AUDITOR OF STATE.—*Custodian of State Land Records.*—The transfer of the land records from the office of Secretary of State to the office of the Auditor of State, as provided by §7961 Burns 1901, carries with it the duty of recording in the latter office the deeds previously required to be recorded in the former. pp. 147, 148.

MORTGAGES.—*To Secure Permanent Endowment Funds of University.—Sale.*—Where there is default in the payment of a mortgage to secure permanent endowment funds of the State University, the Auditor of State is not required to foreclose the mortgage, but may sell the mortgaged land by public advertisement without suit. p. 148.

From Marion Superior Court; *J. M. Leathers*, Judge.

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Suit by Abraham G. Brower and others against Emanuel S. Fisher to quiet title. From a decree for plaintiffs, defendants appeal. Transferred from Appellate Court, under §1387u Burns 1901. *Affirmed.*

Pierre Gray and S. M. Richcreek, for appellants.

W. A. Ketcham and F. E. Matson, for appellees.

HADLEY, J.—In July, 1893, the lands described in the complaint were mortgaged to the State for a loan from the permanent endowment fund. The note and mortgage contained the power of sale authorized by statute. In February, 1897, the lands were sold by the county treasurer for the delinquent taxes of 1895 and 1896, and the usual certificate was issued to the purchaser. In 1895 the lands were also assessed for a sewer, and in 1897 they were assessed for sprinkling. In April, 1898, upon default in the payment of interest, the Auditor of State, under authority of statute and the power of sale in the mortgage, and upon due publication, offered the lands for sale to recover the principal of the mortgage loan, with interest, damages, and costs. The lands were bid in by appellees, who were strangers to all other proceedings concerning the property. Upon payment of the amount bid, appellees received from the State a deed for the property. In January, 1899, appellant Fisher, trustee, purchased the tax certificate from the original owner, and in February, 1899, at the end of the two years after the tax sale, received from the county auditor a deed for the premises. In July, 1899, the appellant bond company purchased the sewer assessment against the property, and also, at a date unknown, but subsequent to 1897, purchased the sprinkling assessment against the property. Having learned that appellant Fisher, trustee, by virtue of his tax deed, and appellant bond company, by virtue of its sewer and sprinkling assessments, were each claiming to hold a lien upon the property, the appellees in April, 1900, brought against the appellants this suit to quiet title.

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The complaint sets out in detail the above and other material facts. The separate demurrer of each of the two appellants to the complaint, for insufficiency of facts, was overruled, and, each refusing to plead further, the court rendered judgment against them for cost, and a decree quieting appellees' title to the property in question.

The principal question in the case is, whether a purchaser, other than the State, at a permanent endowment fund mortgage sale, takes the property free from tax and assessment liens incurred after the execution of, and during the time the land was under the mortgage.

I. As ancillary to the main question appellants urge that the permanent endowment fund is a private fund, and not entitled to the constitutional and statutory protection accorded to public school funds, and that with respect to this particular fund the State acts merely as a trustee in making and collecting loans. An inquiry into the origin of the State University, for the maintenance of which institution the permanent endowment fund is exclusively designed, reveals the unmistakable purpose of the people to make the university a part of our public school system. Article 9, §2, of the Constitution of 1816 provided: "It shall be the duty of the General Assembly, as soon as circumstances will permit, to provide by law, for a general system of education, ascending in regular gradation from township schools to a state university, wherein tuition shall be gratis, and equally open to all."

In compliance with this mandate of the Constitution the legislature in 1820 established the State Seminary at Bloomington. Acts 1820, p. 82. In 1828 this institution was advanced to the dignity of Indiana College, an endowment fund established, its trustees required to report receipts, expenditures, etc., to the Governor, for submission to the General Assembly, and the constitution of the college declared to be unalterable by any law or ordinance of the trustees, "nor in any other manner, than by the legis-

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lature of this State." Acts 1828, p. 115. By an act of 1838 (Local Laws 1838, p. 294), the General Assembly conferred upon the institution the name of Indiana University, and the same body in 1842 adopted a joint resolution,—reciting in terms §2 of article 9 of the Constitution of 1816 above quoted,—requiring the trustees of the Indiana University to report to the next legislative session, whether, in their opinion the resources of said university are sufficient to enable the legislature to pass a law making tuition gratis, in compliance with the constitutional mandate. Acts 1842, p. 174. In order that the special relation of the university to the State might be continued unquestioned, under the new Constitution of 1851, the General Assembly of 1852 enacted that "The institution established by an act entitled 'An act to establish a college in the State of Indiana,' approved January 28, 1828, is hereby recognized as the university of the State." 1 R. S. 1852, p. 504, 1 G. & H., p. 660. And again in 1867 the legislature asserted that it should be the pride of every citizen of the State to place the State University in the highest condition of usefulness and make it the crowning glory of our present great common school system. Acts 1867, p. 20.

The maintenance fund is in no smaller sense a state fund. It has its origin from the sale of certain lands of the State acquired by gift from the government for educational purposes. Acts 1828, p. 117. It has been augmented from time to time, as the needs of the university increased, by specific appropriations from the state treasury,—first in 1867 (§6159 Burns 1901); again in 1873 (§6160 Burns 1901); and by general taxation for twelve years beginning in 1883 (§6161 Burns 1901), and again in 1895 (Acts 1895, p. 171).

The university as well as its endowment has always been under the supervision of the State. Five out of its eight trustees are chosen by the state board of education. §6060

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Burns 1901. Its trustees are required to report to the State. §6081 Burns 1901. The Governor shall annually cause 5,000 copies of the report to be printed, at the expense of the State, for distribution. §6084 Burns 1901. The trustees are required to provide for special instruction in certain branches. §§6088, 6089 Burns 1901. The State Librarian shall supply books to its library. §6092 Burns 1901. The State Geologist shall collect specimens of mineralogy and geology for its cabinet. §6093 Burns 1901. The home of the fund is the state treasury, and prior to April, 1897, it was loaned and collected by the state officers (Acts 1852, §§6095-6107 Burns 1901), and the annual interest thereon applied to the expenses of the university, upon warrants drawn on the Treasurer of State by the Auditor of State upon requisitions of the trustees. §6094 Burns 1901.

And as further evidence of the character of the fund, as construed and held by the people themselves, the legislature of 1897, with a prefatory declaration that "the people of the State are equally entitled to the use of said fund, and to its permanent protection," passed a law for the distribution of the fund to the several counties of the State, to be loaned and collected by the several county auditors, and the accruing interest annually reported and paid into the State treasury, at the time and in like manner as interest on the common school fund is paid; the second section of which act reads as follows: "The said moneys so distributed and paid to said counties, as provided by §1 of this act, shall be loaned by the auditors of the respective counties in the same manner, and on the same terms and conditions, and under the same restrictions, subject to the same limitations, and said loans shall be again collected from the borrower, as the common school funds are now loaned and collected. And the said several counties shall be liable in the same manner and to the same extent, for the principal and interest of said fund, and for the payment of the same, as they are now

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liable for the payment of the interest and principal of the common school funds." Acts 1897, p. 117, §6116b *et seq.* Burns 1901.

We therefore conclude from the foregoing review of the subject that the Indiana University is an integral part of our free school system; that it was the special creation of the Constitution; that the protection and preservation of the funds belonging to it have been the special care of the General Assembly; and that its permanent endowment is in every material sense such a public educational fund as the Constitution declares "shall remain inviolate," and is perforce entitled to the same constitutional and statutory favoritism that is shown to other public educational funds. We are strengthened in this view by the manifest and uniform legislative purpose to treat the common school fund and the university fund as distinct, but as belonging to the same class.

With respect to the priority of the mortgage, the power of sale, and the sale on published notice, the respective governing statutes are almost identical. Compare §§5807, 5814, 5820 Burns 1901, with 6100, 6096, 6109 Burns 1901; and it is interesting to note that the provisions just referred to in both these laws are in effect and almost identical in form with the corresponding provisions of the university fund law of 1843. Compare above sections with §§39, 43, 53 R. S. 1843, pp. 245, 246. It may therefore be said, so far as material to the decision of this case, that the principles of the university fund law of 1843, carried into subsequent legislation, rule in the same way the management of all the educational funds of this State, including the permanent endowment fund.

II. This brings us to the main question: Does the sale by the Auditor under a permanent endowment fund mortgage divest the lien of a purchaser at a sale for delinquent taxes, and the lien for municipal improvement assessments, incurred after the execution of the mortgage and

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before the sale thereunder? The statute relating to priorities is as follows: "Such mortgages shall be considered as of record from the date thereof; and shall have priority of all mortgages or conveyances not previously recorded, and of all other liens not previously incurred in the county where the land lies." §6100, *supra*. Under the similar provision relating to the priority of school-fund mortgages, this court has heretofore held that the statute means what it plainly says, namely, that such a mortgage shall prevail against tax and all other liens subsequently incurred. *State, ex rel., v. Jones*, 95 Ind. 175; *Stockwell v. State, ex rel.*, 101 Ind. 1, 9; *McWhinney v. City of Logansport*, 132 Ind. 9. See, also, *Hamilton v. State, ex rel.*, 1 Ind. 128; *Groom v. State, ex rel.*, 24 Ind. 255; *Schnantz v. Schellhaus*, 37 Ind. 85.

There can be no doubt of the power of the legislature, for the protection of the State's trust funds, to make the security therefor paramount to tax and all other liens created or authorized by the State. Tax liens, as well as improvement liens, exist wholly by virtue of the statute. As said in 25 Am. & Eng. Ency. Law, 267, "The lien does not arise by implication from the power to tax. Nor, when expressly created, can it be enlarged by construction; but, on the contrary, the statute providing for it is to be construed strictly." It follows that the power that may and does create liens,—that fixes their duration and limitation, that points out the purposes and the property to which they may attach,—has equal authority to give precedence to one class over another when deemed expedient to do so.

The facts of this case present no question of jeopardy to the State's revenue. When appellants acquired their liens they knew, or had the means of knowledge, and were therefore bound to know, that the State held the property in pledge for a loan from its university fund, and that the pledge was prior and paramount to all other liens subse-

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uently obtained. At the treasurer's sale of the property for delinquent taxes, appellant Fisher's assignor, with knowledge of the prior encumbrance, bought Lander's right to redeem from the State's mortgage. He made the purchase with his eyes open, and whether the thing purchased was worth the sum paid was simply a matter of judgment, freely and voluntarily exercised. After the tax sale the case stood thus: The State still had its mortgage lien unimpaired, its taxes paid; and the purchaser had the right to perfect his title under the tax sale by paying off the State's claim. The same may be said of the contractors who performed work on the faith of promised assessments. These rights of redemption being so held by appellants, when the Auditor gave the required notice that he would enforce payment of the mortgage by sale of the property, it then became their imperative duty, if they would maintain their rights to redeem, to come forward and pay off the State's claim and save a final foreclosure. Failing to do so they are forever barred from enforcing them. *Schnantz v. Schellhaus*, 37 Ind. 85.

III. It is argued that the Auditor's sale was invalid for insufficient notice. The complaint charges that "Said Auditor of State advertised in the Weekly State Journal and the Weekly State Sentinel each a newspaper of general circulation printed in Marion county, Indiana, for sixty days continuously, said publications being on Wednesday of each week for nine successive weeks, the first of which publication was on February 16, 1898, and the last on April 13, 1898, that he would make public sale of said mortgaged premises * * * on the 21st day of April, 1898, at," etc. The contention being that for want of a publication on April 20th, the notice was not such as is required by §6109 Burns 1901, which provides that "the Auditor shall advertise the mortgaged property for sale in one or more of the newspapers printed in this State, for sixty days." The language of the statute is "shall adver-

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tise in one or more of the newspapers printed in this State." A weekly newspaper, which means a paper published but once each week, or but once in each seven days, comes within the requirements of the statute. One insertion in such a paper must therefore be considered as a publication continuing for seven days, or to the next regular day of issue (*Nebraska, etc., Co. v. McKinley-Lanning, etc., Co.*, 52 Neb. 410, 72 N. W. 357); and a publication each week for nine successive weeks is a publication for sixty-three days. The first publication is alleged to have been made February 16, 1898, and to have been repeated once a week for nine weeks continuously to and including April 13th. This was equivalent to an advertisement to and including April 19th, which was two days before the sale, and was a sufficient compliance with the statute. There is nothing in *Brown v. Ogg*, 85 Ind. 234, in conflict with this view.

IV. The invalidity of the sale is asserted for the further reason that appellees' deed is not alleged to have been recorded in the office of the Secretary of State as required by §6115 Burns 1901. The averment is "that said deed was duly recorded in the office of the Auditor of the State of Indiana in accordance with the provisions of §§6115, 7651 Burns 1901." The language of §6115, *supra*, is, "On the production of the Treasurer's receipt for the purchase money, the Auditor shall give to the purchaser, a certificate which shall entitle him to a deed for said land, to be executed by the Governor of this State, and recorded in the office of the Secretary of State." This latter statute was enacted as §49 of the act of June 17, 1852 (1 R. S. 1852, p. 504, 1 G. & H., p. 660), at a time when the Secretary of State was the legal custodian of the record of such instruments. But in 1877 the legislature, for the purpose of concentrating all the State's land matters in one place, created a land department, and the office of land clerk, in the Auditor of State's office. And to accomplish this concentration it is provided in said act that the Secretary and

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Treasurer of State, and all other public officers having the custody of any such records and papers, shall transfer to the Auditor of State "all the records pertaining to the swamp lands, State University lands * * * sale-books, tract-books, * * * all original land records * * * and all records pertaining to lands mortgaged to the various trust funds (viz., college fund, sinking fund, * * * and any other trust funds mortgaged to the State)." §7651 Burns 1901. The only proper place for the record of a deed, or other instrument, is in the office of the custodian of the record, and the transfer of the land records from the office of the Secretary of State to the office of Auditor of State must be held to have carried with it the duty of recording in the latter office the deeds previously required to be recorded in the former.

V. Finally it is insisted that the sale is illegal because it could only have been made by suit to foreclose, and not by public advertisement; the contention being that in the act of 1883 (§6164 Burns 1901), which creates the permanent endowment fund, it is not provided that the endowment shall be *collected* as provided by the act of 1853 relating to the university fund, and that the collection therefore is confined to the ordinary remedy prescribed for private individuals. The argument is not convincing. The language of the act of 1883 is, "In making loans, and disbursing interest collected the Treasurer of State and Auditor of State shall be governed by the law now in force regulating the manner of making loans of the university funds." Regulate means "to subject to governing principles, to rule, to govern." Webster's Int. Dict.

Under the law of 1883 the Treasurer and Auditor of State, in loaning the endowment funds were controlled *by the law* regulating—that is governing—the manner of making loans of university funds. To be governed by *the law*, is to be governed not only by a part but by the whole law relating to the subject. Besides, if these officers were to be gov-

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erned by the law of 1853 (§§6095-6104 Burns 1901), then they were imperatively commanded, in making such loans, to require the mortgagor expressly to stipulate in the mortgage that upon default in the payment of interest the Auditor might sell the property for the collection of the loan. There can be no reason for requiring the Auditor to take a power of sale mortgage, if power to sell the property under it was withheld. If for no other reason than the requiring of a power of sale mortgage, it would seem certain that the whole law relating to the collection, as well as to the loaning of the fund, was adopted by §6164 Burns 1901.

Judgment affirmed.

**MONTEITH v. KOKOMO WOOD ENAMELING
COMPANY.**

[No. 19,580. Filed June 25, 1902.]

MASTER AND SERVANT.—*Personal Injury.*—*Failure to Guard Dangerous Machinery.*—*Knowledge by Employee.*—*Volenti non fit Injuria.*—A complaint for a personal injury to an employe while operating a circular saw, resulting from the failure of the employer to guard the same, as required by §7087i Burns 1901, is sufficient without an averment that the plaintiff had no knowledge of the unguarded condition of the saw and the dangers resulting therefrom.

From Howard Superior Court; *Hiram Brownlee*, Judge.

Action by Frank L. Monteith against the Kokomo Wood Enameling Company for personal injuries. From a judgment for defendant on demurrer to complaint, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

B. C. Moon, for appellant.

J. C. Blackledge, *C. C. Shirley* and *Conrad Wolf*, for appellee.

DOWLING, C. J.—This was an action for a personal injury alleged to have been sustained by the appellant while in the employment of the appellee in consequence of the neglect

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161	517
161	681
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163	188
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164	874
164	420
164	421
164	492
164	542
164	544
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165	301
159	149
168	43
159	149
169	252
170	630

of the appellee to perform a statutory duty owing to him. A demurrer to the complaint for the insufficiency of the facts stated was sustained, and, the appellant refusing to amend, judgment was rendered against him. The ruling on the demurrer is assigned for error.

The material averments of the complaint are as follows: The appellee was on October 4, 1900, a corporation, and owned and carried on a factory in the city of Kokomo, Indiana. On said day, the appellant was, and for some weeks had been, employed by and working for the appellee at its said factory. In the course of his employment, and in pursuance of the instructions of the appellee, the appellant was engaged in operating and using a small circular saw driven by steam at a high rate of speed. During the whole time the appellant was so employed, there was a defect in the machinery so used by him, which was known to the appellee, and which consisted in the absence of a guard over the said saw, the appellee having negligently failed to provide any such guard. In consequence of such defect, and of the negligence of the appellee in failing to provide such guard, the appellant, on the day aforesaid, while in said employment, was injured by the contact of his left hand with the said saw while he was operating the same, his thumb and two fingers being cut off.

The sufficiency of the complaint is contested upon the ground that the defect which caused the supposed injury, and the dangerous condition created by it, were necessarily open and obvious; that the appellant was bound to take notice of them; and that it appears that with knowledge of the danger he assumed the risk. The question is, can an employe recover for an injury resulting from an obvious defect in machinery resulting from the employer's failure to perform a statutory duty? In other words, is the complaint bad because it does not aver that the appellant was ignorant of the dangers arising from the failure of the employer to guard the saw?

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Under the rules and maxims of the common law, where the danger is obvious and known to and appreciated by the servant, if he continues in the employment without inducement through the promise of the master to repair or make safe, he waives his right to hold the master responsible for injury occurring to him from the negligence of the master, and assumes the risk of such injury himself. If the danger is as well known or as manifest to the servant as to the master, and is understood by him, the servant enters or continues in the employment at his own risk. *Pennsylvania Co. v. Sears*, 136 Ind. 460; *Louisville, etc., R. Co. v. Kemper*, 147 Ind. 561; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513; *Louisville, etc., R. Co. v. Sandford*, 117 Ind. 265; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa 14, 4 Am. Rep. 181; *Lindsay v. New York, etc., R. Co.*, 112 Fed. 38, 50 C. C. A. 298.

It is entirely clear, however, that where an absolute and specific duty to guard or fence dangerous machinery is imposed upon the master by statute, such new condition must, in a very material manner, affect the relations of the parties, and modify, to a considerable extent, their rights and duties as they existed at common law. And here a distinction is to be noted between statutes such as the employer's liability act (Acts 1893, p. 294, §§7083-7087 Burns 1901), which provide in general terms that the employer shall be liable for injuries to an employe where the injury is occasioned by reason of defects in the condition of ways, works, plant, tools, and machinery, etc., and statutes which require of the employer the performance of a specific duty, such as to guard or fence dangerous machinery. Statutes of the former class do little more than declare the rule of the common law. Statutes of the latter class impose specific obligations. A failure to comply with the requirements of the first may or may not be negligence. A violation of the second is an unlawful act or omission, a plain breach of a particular duty owing

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to the servant, and generally constitutes negligence *per se*. *Pittsburgh, etc., R. Co. v. Burton*, 139 Ind. 357; *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524; *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; *Thompson, Neg.* (2d ed.), §§10, 11, 211; *Western, etc., R. Co. v. Young*, 81 Ga. 397, 7 S. E. 912, 12 Am. St. 320; *Thompson v. Wright*, 22 Ont. 127.

Although the complaint makes no reference to the statute, the action is founded upon §9 of the act of March 2, 1899 (Acts 1899, p. 231, §7087i Burns 1901), entitled "An act concerning labor, and providing means for protecting the liberty, safety, and health of laborers, providing for its enforcement by creating a department of inspection, and making an appropriation therefor, repealing all laws in conflict therewith." Section 9 contains this provision: "All vats, pans, saws, planers, cogs, gearing, belting, shafting, set-screws, and machinery of every description therein shall be properly guarded." Section 25 of the act declares that "Any person who violates or omits to comply with any of the provisions of this act * * * shall be deemed guilty of a misdemeanor, and on conviction shall be fined not more than \$50 for the first offense, and not more than \$100 for the second offense, to which may be added imprisonment for not more than ten days, and for the third offense, a fine of not less than \$250 and not more than thirty days' imprisonment in the county jail." The act does not in terms give a right of action to the person injured, nor is any part of the penalty recoverable by, or payable to, such person.

The general rule is that when a statute requires an act to be done by one person for the benefit of another, and an injury is sustained by one intended to be protected by reason of a violation of such statutory duty, an action lies in favor of the latter against the former for the neglect to perform such duty, even though the statute gives no special remedy. 1 Comyns' Digest: Action (A); Wharton, Neg.

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(2d ed.), §443; Bishop, Non-contract Law, §132; *Pau-ley v. Steam Gauge, etc., Co.*, 131 N. Y. 90, 29 N. E. 999, 15 L. R. A. 194; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; 1 Thompson, Neg., §8, p. 506; Cooley, Torts (2d ed.), 654; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543, 12 Am. St. 698 and note. The later American and English cases qualify the general rule to this extent, that the right to bring an action for damages for an injury resulting from the breach of a statutory duty depends on the purview of the legislature in the particular statute, and the language which they have there employed. *Atkinson v. Newcastle, etc., Water-Works Co.*, L. R. 2 Ex. D. 441; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 239, 4 Sup. Ct. 369, 28 L. Ed. 410.

What, then, is the scope of the statute under consideration? Its title indicates its purpose. It is "an act concerning labor, and providing means for protecting the liberty, safety, and health of laborers." The object of many of its provisions is to reduce the hazards of certain employments in which machinery is used. Its effect is to impress upon certain kinds of machinery, such as saws, planers, cogs, gearing, belting, or shafting, in any manufacturing establishment, the character of dangerous machinery, and to interdict their use by the employer unless properly guarded.

Before the passage of the act of March 2, 1899, what was the position of laborers in factories where exposed saws, planers, etc., were used? If they saw and realized the danger attending the use of such machinery, they must either have assumed the risk of injury from it, or quit their employment. No law required the employer to put up a fence or guard, and he was relieved from liability in case of injury to his employe. The expressed purpose of the act being to secure the safety of the laborer, how is that object to be accomplished through its instrumentality? A violation of its provisions may be punished by fine and

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imprisonment of the employer, or certain of his representatives. But in case of injury the laborer would derive no benefit from a criminal prosecution. The State has an interest in the preservation of the lives, the limbs, and the health of all of its citizens; and for this reason, on grounds of public policy, the legislature may enact laws for their safety and protection when employed in factories or other places where dangerous machinery is used. The laborer has a much greater interest in the preservation of his own safety than has the public. The statute is designed primarily and chiefly for his benefit, and upon a violation of its provisions, and a consequent injury to him, he has a right of action and a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the terms thereof. The public wrong may be redressed by fine and imprisonment. The private injury can be compensated only by the payment of damages to the injured workman. *Zimmerman v. Baur*, 11 Ind. App. 607, 613, 614; *Dresser's Employers' Liability*, 246, 247, 594.

So far the law is plain. But at this point we are met by the rule *volenti non fit injuria*. In the case of a violation of a specific statutory duty by the employer, resulting in an injury to the workman, is the latter deprived of his remedy for the private injury by his knowledge and appreciation of the risk? In other words, if the master, in disregard of the statute, fails to guard the dangerous machinery, and the workman knowing that the statute is being violated, seeing the defect, and comprehending the danger, does he continue in the employment and in the use of the unguarded machinery at his own risk, or at the risk of his employer? On this question, the authorities in this country are by no means uniform. The English cases generally sustain the proposition that where there is a violation of a specific statutory duty of the employer to fence or guard

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machinery declared by law to be dangerous, he, and not the workman, assumes the risk of injury to the workman.

Clarke v. Holmes, 7 H. & N. 973, 31 L. J. R. (N. S.) Exch. 356,—sometimes referred to as sustaining the view that a right of action accrues to the injured workman from a violation of the statutory duty on the part of the employer to fence dangerous machinery,—does not decide that point. Lord Chief Justice Cockburn doubted whether the liability of the defendant in that case arose under the factory acts, Statutes 7 & 8 Vict. Chap. 15; and 19 and 20 Vict. Chap. 38, requiring machinery to be fenced, owing to the plaintiff being an adult; and Byles, J., expressly said: "I do not rest the right of the plaintiff to recover on the statutable obligation incumbent on the master to fence the machinery," etc. The facts were that the plaintiff was employed by the defendant to oil dangerous machinery. At the time he entered upon the service, the machinery was fenced, but the fencing became broken. The plaintiff complained of the dangerous state of the machinery, and was promised that the fencing should be restored. The plaintiff continuing in the service, on the faith of that promise, was injured without negligence on his part. The judgment of the exchequer chamber that the defendant was liable for the injury was affirmed on the ground that the defendant independently of any statutory duty was negligent in not repairing the fencing of the machinery, and that the plaintiff had a right to rely on the promise to repair, and continued in the service, exercising due care.

Thomas v. Quartermaine, L. R. 18 Q. B. D. 685, was brought upon the employer's liability act, 1880. Section 1 of that act provided that "Where after the commencement of this act personal injury is caused to a workman—(1) By reason of any defect in the state or condition of the ways, works, machinery, or plant connected with or used in the business of the employer," and, in four specified instances by reason of negligence of others in the employer's

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service, "the workman * * * shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work."

In that case, the defendant was the owner of a brewery in which was a vat full of scalding liquid, around which there was a rim sixteen inches high, and near it a boiling vat. The plaintiff attempted to pull a board from under the latter, which came out more easily than he expected, so that he fell back into the scalding fluid and was injured. It was held by Bowen and Fry, L. JJ.,—Lord Esher, M. R., dissenting,—that the defense arising from the maxim *volenti non fit injuria* had not been affected by the employer's liability act, and applied to the circumstances of that case; that there was, therefore, no evidence of negligence arising from a breach of duty on the part of the defendant toward the plaintiff, and that the plaintiff was not entitled to recover. It will be noticed that the act imposed no specific obligation on the employer to fence or guard machinery, and that its declared object was to place a workman, injured by reason of any defect in the ways, works, machinery, or plant connected with or used in the business of the employer, in the same position as a stranger lawfully on the property by the invitation of the occupier.

The difference between an action arising upon this act, and one founded upon the violation of a particular and definite duty imposed by statute is repeatedly recognized in the opinions of Bowen and Fry, L. JJ. For instance, it is said by the former: "It is no doubt true that the knowledge on the part of the injured person which will prevent him from alleging negligence against the occupier must be a knowledge under such circumstances as lead necessarily to the conclusion that the whole risk was voluntarily incurred. The maxim, be it observed, is not '*scienti non fit injuria*,' but '*volenti*.' It is plain that mere knowledge may not be a conclusive defense. There may be a perception

of the existence of the danger without comprehension of the risk; as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily. The injured person may have had a statutory right to protection, as where an act of parliament requires machinery to be fenced." And Fry, L. J., refers to the same important distinction when he says: "Knowledge is not of itself conclusive of the voluntary character of the plaintiff's actions: there are cases in which the duty of the master exists independently of the servant's knowledge, *as when there is a statutory obligation to fence machinery.*" (Our italics.)

Britton v. Great Western Cotton Co., 7 L. R. Ex. 130, was decided upon this state of facts. B., aged twenty-two, was employed by the defendants, the owners of a "factory," within the meaning of 7 Vict. Chap. 15, to grease the bearings between the fly and spur-wheel of a steam engine in their engine house. In order to do the work he had to stand on a wall two feet three inches thick, in a cavity made for the purpose, the fly-wheel being on his left hand, revolving in a "wheel-race" in the engine house, and the spur-wheel on his right hand, revolving in another room in the factory. The two wheels revolved in parallel planes, the distance between them being two feet ten inches. There was no fence along the wall edge of the wheel-race on which B. was placed to do his work; and the fly-wheel,—near to which, however, children or young persons were not liable to pass or be employed,—was unfenced. At the time of the accident, B. had been at work for five days. On the sixth morning he was caught by the fly-wheel, whirled into the air, and killed. At the trial of an action by his widow and administratrix for pecuniary loss sustained by his death, the jury found that he had not been guilty of contributory negligence, either in undertaking the employ

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ment, or whilst engaged upon it, and returned a verdict for the plaintiff. On a rule to set it aside, pursuant to leave, on the ground that there was no statutory duty to fence the place in question, and that the deceased had voluntarily encountered the risk incidental to his employment, it was held: (1) That the defendants were bound under 7 and 8 Vict. Chap. 15, §21, to fence the place where B. had to stand, it being near the edge of a wheel-race not otherwise secured; and (2) that the dangerous character of the employment was not so obvious that he must necessarily be taken to have known it; that circumstance alone was not enough to constitute him a "volunteer" in such a sense as to exonerate the defendants from liability for the consequences of their breach of their statutory duty. In the course of his opinion, Bramwell, B., says: "But now we come to the great difficulty in the case. Does the maxim, '*volenti non fit injuria*,' apply? I think not. True, Britton was in one sense '*volens*'. He need not have gone where he did. But he must not only be a volunteer in the sense that he went there when he might have stopped away, but it must clearly appear that he went voluntarily, with a full knowledge and understanding of the risk. It is suggested he must have known it. I doubt it. The jury have found him not guilty of contributory negligence either in going or being there, and I can not say they were wrong. I do not myself see that the place was necessarily dangerous. At any rate the deceased may well have thought it was not. Indeed, the accident seems to have resulted not from the necessarily dangerous character of the place, but from some misfortune which might have happened anywhere. It is further contended that at any rate the deceased knew the danger as well as his employers. That may be doubtful in fact, for he seems not to have been a skilled workman, but a coal trimmer. Assuming, however, that he did share his employers' knowledge, it must be remembered that the liability of the defendants here is not at common law but by

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statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed."

In *Baddeley v. Granville*, L. R. 19 Q. B. D. 423, the same principle is affirmed even more positively than in the cases already mentioned. It is there said by Wills, J., that "An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of obligation people may come to what agreements they like; but as to future breaches of it, there ought to be no encouragement given to the making of an agreement between A and B that B shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal, though I do not hold as a matter of law that it would be so. But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others, as well as of himself, such an agreement would be in violation of public policy and ought not to be listened to. On that ground there is much to be said in favor of the opinion expressed in the court of appeal, that where there has been a breach by a defendant of a statutory obligation the maxim *volenti non fit injuria* has no application." See, also, *Groves v. Wimborne*, (1898) 2 Q. B. 402, 67 L. J. Q. B. 862; *Smith v. Baker*, (1891) App. Cas. 325.

From these and other cases of similar import in the English courts, the following rules have been deduced: "Where a statute of a public character prescribes in re-

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gard to a class of persons the performance of certain acts, as reasonable precautions for the health or safety of a class of persons having to do with them, the neglect of such a statutory precaution gives a right of action to any person, within the scope of the intended benefit, who, by reason of the neglect, suffers damage of the kind intended to be provided against." 19 Eng. Ruling Cases, 42. "The maxim *volenti non fit injuria* is not applicable in cases where the injury arises from the breach of a statutory duty. Mere knowledge on the part of the servant that the plant employed was defective and dangerous will not necessarily be construed as amounting to a voluntary undertaking of a particular risk." 17 Eng. Ruling Cases, 212. Many American courts have expressed similar views. *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447; *Durant v. Lexington, etc., Co.*, 97 Mo. 62, 10 S. W. 484; *Simpson v. New York, etc., Co.*, 80 Hun 415, 30 N. Y. Supp. 339; *Narramore v. Cleveland, etc., R. Co.*, 37 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68; *Landgraf v. Kuh*, 188 Ill. 484, 59 N. E. 501; *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131; *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156, 63 N. E. 649. The same doctrine has been recognized in this State. *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479; *Davis Coal Co. v. Polland*, 158 Ind. 607.

In the case last cited, it is said: "A definite standard [of care] was fixed by the legislature. It is the duty of the employer to use the very means named in the statute. He is not at liberty to adopt others though, in his opinion, they are more efficacious than those prescribed by the law-makers. How, then, can there be any lawful basis for an agreement, implied or express, that the employer shall violate the law, and that the employe shall be remediless?"

The case of *Knisley v. Pratt*, 148 N. Y. 372, 32 L. R. A. 367, is directly in conflict with the rules established by the English cases, and adopted by the courts of this

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country in Illinois, Missouri, Ohio, and Indiana. The court say: "We are of opinion that there is no reason in principle or authority why an employe should not be allowed to assume the obvious risks of the business as well under the factory act as otherwise. There is no rule of public policy which prevents an employe from deciding whether, in view of increased wages, the difficulties of obtaining employment, or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does indeed contemplate the protection of a certain class of laborers, but it does not deprive them of their free agency and the right to manage their own affairs."

In the earlier case of *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536, the court held that the discovery by a tenant that the landlord had violated his statutory duty to provide fire-escapes, did not absolve the defendant; that the tenants, "after making the discovery, were not bound at once to leave the house and go into the street. They had a reasonable time to look for and move into other apartments; and, by remaining for such reasonable time, they waived nothing."

In *Huda v. American, etc., Co.*, 154 N. Y. 474, 482, 48 N. E. 897, 40 L. R. A. 411, it was said by the court, Gray, J., delivering the opinion: "Of course, it is not to be understood from what has been said that it necessarily follows that employes would assume such risks connected with the management of the business as would result from a violation by the employer of the statute in a neglect to provide fire-escapes. That presents a different question."

In the present case, the risk existed at the time the appellant entered the employment. Whatever it was, whether great or slight, obvious or otherwise, it resulted from the failure of the employer properly to guard the saw. But we can not say, as a matter of law, that the use of the saw

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without a guard appeared to the appellant to be necessarily dangerous. The position of the saw, and the manner in which it was to be used, may have seemed reasonably safe. There is nothing in the complaint to show that the appellant had any cause to think the saw dangerous. The complaint does not allege that the appellant had no knowledge of the fact that the saw was not guarded, or that he did not see and comprehend such danger as arose from its condition. And in an action upon §9 of this statute, this averment was not necessary.

Notwithstanding the violation of the statute by the employer, it would be the duty of the employe to exercise reasonable care in the use of the unguarded saw; and if his own negligence contributed to the accident he could not recover.

Many important questions may arise under the act of March 2, 1899, generally known as the factory act, and we do not wish to be understood as anticipating or deciding them. What we decide is that the complaint in this case, for a supposed injury arising under §9 of that act, is sufficient, without an averment that the plaintiff had no knowledge of the unguarded condition of the saw, and the dangers resulting therefrom.

Judgment reversed, with instructions to the court to overrule the demurrer to the complaint, and for further proceedings in conformity to this opinion.

COOK v. BUHLAGE ET AL.

[No. 19,878. Filed June 25, 1902.]

HUSBAND AND WIFE.—*Married Women.*—*Suretyship.*—*Bills and Notes.*—

Whether a married woman is a surety or a principal on a note is to be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received, in person or in estate, the benefit of the consideration upon which the contract rests. pp. 163, 164.

159	163
160	523
160	526
160	530
159	163
163	579
163	580
159	162
166	650

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HUSBAND AND WIFE.—*Married Women*.—*Suretyship*.—*Bills and Notes*.

—Where the sole consideration of a note executed by a married woman and another was property conveyed, the title to which did not vest in the former, she was only a surety on the note, and the same was void as to her. pp. 164, 165.

From Marion Superior Court; Vinson Carter, Judge.

Action by Louisa C. E. Cook against Minnie L. Buhrlage and Wilhelmina Theine upon promissory notes. From a judgment in favor of defendant Wilhelmina Theine, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed*.

W. V. Rooker, C. T. Hanna and T. A. Daily, for appellant.

E. B. Raub, for appellees.

MONKS, J.—Appellant brought this action upon several promissory notes executed by appellees for real estate conveyed to appellee Buhrlage. The complaint does not disclose the fact that appellee Wilhelmina Theine was, when she executed said notes, a married woman. It became a question, under the issues, whether or not appellee Theine was a principal or surety on said notes. The jury returned a general verdict in favor of appellant against appellees, and answered interrogatories submitted by the court. Over appellant's motion for a new trial the court rendered judgment on the general verdict against appellee Buhrlage, and in favor of appellee Theine on the answers to interrogatories notwithstanding the general verdict. These rulings of the court are assigned for error.

The jury found, in answer to the interrogatories submitted by the court, that appellee Wilhelmina Theine was, when she executed the notes sued upon, a married woman; that the only consideration for said notes was certain real estate conveyed by appellant to appellee Buhrlage, who executed the notes sued upon.

It has been decided by this court that whether or not a married woman is a surety or principal on a note is to be

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determined not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received, in person or in estate, the benefit of the consideration upon which the contract rests. *Field v. Noblett*, 154 Ind. 357, 360, and cases cited; *Lackey v. Boruff*, 152 Ind. 371, 376, and cases cited; *Leschen v. Guy*, 149 Ind. 17, 19; *Crisman v. Leonard*, 126 Ind. 202, 203, and cases cited; *Thacker v. Thacker*, 125 Ind. 489, 490, 491; *Potter v. Sheets*, 5 Ind. App. 506, and cases cited; *Dickey v. Kalfsbeck*, 20 Ind. App. 290, 293, and cases cited.

It was said in *Crisman v. Leonard*, *supra*, at page 203: "It may be conceded that a married woman can not purchase property and become bound for the payment therefor, where the title vests in another; but she may purchase property and bind herself for its payment where the title vests in her. *Chandler v. Spencer*, 109 Ind. 553, 555."

The jury found in this case that the sole consideration for the notes sued upon was property conveyed by appellant to appellee Buhrlage. As the title to said property did not vest in appellee Theine, but vested in another, and the same was the sole consideration for said notes, she, being a married woman, was only surety on said notes, and the same were void as to her. *Crisman v. Leonard*, *supra*; *Chandler v. Spencer*, *supra*; *Thacker v. Thacker*, *supra*.

Where the obligation sued upon is executed by the married woman alone, although secured by a mortgage upon her separate real estate, or where the obligation sued upon is that of the husband and wife and is secured by a mortgage on real estate held by them by entireties, there is no presumption that she is surety, or in the latter case that the consideration obtained was not used for the benefit of the joint estate, and the burden is upon her to allege and prove that she executed the note and mortgage as surety and not as principal, and the complaint in such case is sufficient, even if it disclose that she was a married woman.

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when the note and mortgage were executed, without the allegation of any special facts showing that she was principal, and not surety. *Field v. Noblett*, 154 Ind. 357, 359, 360; *Cummings v. Martin*, 128 Ind. 20, 23, 24; *Crisman v. Leonard*, 126 Ind. 202, 203; *Security Co. v. Arbuckle*, 119 Ind. 69, 71; *Miller v. Shields*, 124 Ind. 166, 8 L. R. A. 406.

But it has been held, in effect, that, in an action on a contract executed by a married woman and another, other than the kind above mentioned, if the complaint discloses that she is a married woman, it must also allege facts showing that she was principal and not surety on said contract, or the complaint will not be sufficient to withstand her separate demurrer for want of facts; that, if such complaint does not disclose that she was a married woman when she executed the contract sued upon, she may answer that fact in bar of the action, to which the plaintiff may reply by alleging facts showing, notwithstanding such coverture, she was bound as principal upon such contract. *Field v. Noblett, supra*; *Crisman v. Leonard, supra*; *Vogel v. Leichner*, 102 Ind. 55, 60, 61; *Nixon v. Whitely, etc., Co.*, 120 Ind. 360; *Cupp v. Campbell*, 103 Ind. 213, 217, 218; *Brown v. Will*, 103 Ind. 71; *Cummings v. Martin*, 128 Ind. 20, 23, 24; *Thacker v. Thacker*, 125 Ind. 489, 490, 491; *Potter v. Sheets*, 5 Ind. App. 506; *Dickey v. Kalfsbeck*, 20 Ind. App. 290, 293; *Arnold v. Engleman*, 103 Ind. 512.

We have carefully considered the evidence, and can not say that the same does not fully support the answers of the jury to the interrogatories.

Finding no error in the record, the judgment is affirmed.

CHICAGO AND SOUTH EASTERN RAILWAY
COMPANY v. GLOVER ET AL.[No. 19,819. Filed November 26, 1901. Rehearing denied
June 25, 1902.]

MASTER AND SERVANT.—*Monthly Payment of Wages.*—*Labor Claim.*—*Assignment.*—*Action by Assignee.*—Under §§7056, 7057 Burns 1901, providing that a corporation shall, in the absence of a written contract to the contrary, pay its employes at least once a month, and providing a penalty of \$1 a day for a violation thereof, the penalty cannot be recovered upon a demand and action by an assignee of a labor claim. pp. 167, 168.

SAME.—*Corporation.*—*Penalty for Violation of Monthly Payment Wage Law.*—*Special Finding.*—In an action against a corporation to recover penalty for failure to make monthly settlements with employes, a special finding that "there was no contract of employment between any of the employes and the defendant" is not equivalent to a finding of facts showing that there was no written contract between the corporation and said employes as to the time of payment of wages. p. 169.

CONSTITUTIONAL LAW.—The constitutionality of a statute will not be passed upon if the question at issue can be passed upon otherwise. p. 170.

From Madison Circuit Court; *J. F. McClure*, Judge.

Action by Robert J. Glover, against the Chicago and South Eastern Railway Company. From a judgment for plaintiff defendant appeals. *Reversed.*

W. R. Crawford, *U. C. Stover* and *W. H. Najdowski*, for appellant.

P. S. Kennedy, *S. C. Kennedy* and *Dumont Kennedy*, for appellee.

MONKS, J.—This action was brought in 1898 against appellant by appellee as assignee of a number of claims for labor. Appellant was a corporation engaged in the operation of a railroad. The labor sued for was performed for it by several persons, in the years 1896 and 1897, to each of whom a separate time check was issued for each month. These time checks were assigned by the persons to whom

159	166
160	585
159	166
161	251
161	359
162	96
162	101
159	166
164	490
159	166
168	80
159	166
169	160
170	166

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issued to N. J. Glover & Son, and were by that firm assigned to appellee. Appellee sought to recover judgment for the time checks and interest, and for penalty and attorney's fees under §§1, 2, Acts 1885, p. 36, §§7056, 7057 Burns 1901, §§5206a, 5206b Horner 1897. The cause was tried by the court, a special finding of facts made, and conclusion of law stated in favor of appellee, and judgment rendered against appellant for the amount of time checks, interest, penalty, and attorney's fees, as provided in said sections.

The correctness of the conclusion of law is challenged by the assignment of errors. Appellant insists that, upon the facts found, appellee was not entitled to recover the penalty and attorney's fees under §§7056, 7057, *supra*. Said sections are as follows: "§7056. (1) That every company, corporation or association now existing, or hereafter organized and doing business in this State, shall, in the absence of a written contract to the contrary, be required to make full settlement with, and full payment in money to, its employes engaged in manual or mechanical labor, for such work and labor done or performed by said employes for such company, corporation or association at least once in every calendar month of the year. §7057. (2) If any company, corporation or association shall neglect to make such payment, such employe may demand the same of said company, corporation or association, or any agent of said company, corporation or association, upon whom summons might be issued in a suit for such wages, and if said company, corporation or association shall neglect to pay the same for thirty days thereafter, said company, corporation or association shall be liable to a penalty of \$1 for each succeeding day, to be collected by such employe in a suit (together with reasonable attorney's fees in said suit) for wages withheld: Provided, that said penalty shall in no instance exceed twice the amount due and withheld."

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These sections, being penal and in derogation of the common law, must be strictly construed; and no one can recover thereunder unless he, by averment and proof, brings himself clearly within the terms thereof. *State v. Cleveland, etc., R. Co.*, 157 Ind. 288; *Western Union Tel. Co. v. Harding*, 103 Ind. 505, 508; *Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Hamilton v. Jones*, 125 Ind. 176; *Thornburg v. American Strawboard Co.*, 141 Ind. 443, 444, 445, 50 Am. St. 334, and cases cited; *McDonald v. Pittsburgh, etc., R. Co.*, 144 Ind. 459, 460, 32 L. R. A. 309, 55 Am. St. 185; *Indianapolis, etc., R. Co. v. Keeley*, 23 Ind. 133, 23 Am. & Eng. Ency. Law, 375-378; Endlich, *Interp. of Stat.*, §§340, 341, 471; Black, *Interp. of Laws*, 300.

In *Western Union Tel. Co. v. Harding, supra*, at page 508, this court said: "In construing a penal statute, it must be remembered that the law will intend nothing in favor of the imposition of a penalty until, upon a strict construction, it appears there has been a clear violation of the statutory obligation for which the penalty is imposed."

In *Western Union Tel. Co. v. Axtell, supra*, at page 202, this court said: "A court can not create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it." It was said by this court in *Indianapolis, etc., R. Co. v. Keeley, supra*, "As the right to sue is purely a statutory one, and in derogation of the common law, the statute must be strictly construed, and the case brought clearly within its provisions, to enable the plaintiff to recover."

Section 7057 Burns 1901, gives the penalty on the neglect to comply with the demand of the employe for payment. There is no provision of said section giving a penalty or a right to recover attorney's fees, when the demand is made by an assignee of the employe. The failure of appellant

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to comply with the demand of appellee as assignee is not an omission for which said section creates or provides a penalty, or gives the right to recover attorney's fees.

It will be observed that said §§7056, 7057 Burns 1901, do not apply to a case where there is a written contract for the payment of the wages of such employes contrary to the provisions of said §7056, *supra*. It is essential, therefore, to a recovery under said sections that the facts showing the absence of such a contract be alleged and proved. *City of New Albany v. Endres*, 143 Ind. 192, 203, 204, and cases cited; *Goodwin v. Smith*, 72 Ind. 113, 117, 120, 37 Am. Rep. 144, and cases cited; *Boulden v. McIntire*, 119 Ind. 574, 581, 582, 12 Am. St. 453. In the special finding in this case no facts are found showing the absence of such a contract. It is true that the special finding states that "there was no contract of employment between any of said employes and the defendant;" but this is not equivalent to a finding of facts showing that there was no written contract between appellant and said employes as to the time of payment of wages, contrary to the provisions of said §7056, *supra*. There may be no express contract of employment when the services begin or while being rendered, but a contract in writing may subsequently be made as to the time of payment of the money found to be due for such services.

The rule is well settled that every fact essential to a plaintiff's recovery must be stated in a special finding, and any such fact, if not stated, must be deemed to be found against him. *Relender v. State, ex rel.*, 149 Ind. 283, 290. There being no finding of facts showing the absence of the contract mentioned in said §7056, *supra*, it follows that the conclusion of law that appellee was entitled to recover penalties and attorney's fees under said §7057, *supra*, was erroneous.

It is insisted that said §7057, *supra*, is unconstitutional and void because in conflict with §23 of article 1, and

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§§22, 23 of article 4 of the Constitution of this State, and of the fourteenth amendment to the Constitution of the United States, for the reason that its operation is confined by §7056, *supra*, to companies, corporations, and associations regardless of the kind or nature of the business the company, corporation, or association may conduct, and does not apply to an individual who is conducting a similar business. It is settled, however, that this court will not pass upon the constitutional validity of a statute if the case in which the question is raised can be decided without passing upon that question. *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687, 694; *Board, etc., v. Board, etc.*, 146 Ind. 138, 144; *Legler v. Paine*, 147 Ind. 181; *Cleveland, etc., R. Co. v. City of Connersville*, 147 Ind. 277, 37 L. R. A. 175, 62 Am. St. 418.

Judgment reversed with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

CASE ET AL. v. BENNETT, ADMINISTRATRIX.

[No. 19,841. Filed June 26, 1902.]

APPEAL AND ERROR. — *Evidence.* — *Bill of Exceptions.* — *Record.* — In order to make the evidence a part of the record on appeal, the same must be incorporated in a bill of exceptions, which shall be examined and approved by the trial judge as a bill of exceptions, and, when thus judicially perfected, filed in open court, or in the clerk's office, as a part of the proceedings in the case in accordance with the act of 1897.

From Hamilton Circuit Court; *John F. Neal*, Judge.

Action by Martha Bennett, administratrix of the estate of Alfred Bennett, deceased, against Vincent Case and another for the death of decedent. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

R. P. Neal, I. W. Christian, W. S. Christian and E. E. Cloe, for appellants.

P. J. Fariss, F. E. Gavin, T. P. Davis and J. L. Gavin,
for appellee.

HADLEY, J.—Appellee recovered against appellants a judgment for \$800 for alleged negligence which caused the death of appellee's decedent. The only assignment of error presented to the court is the overruling of appellants' separate motion for a new trial. The reasons for a new trial are,—by appellant Daffron,—that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law, and,—by appellant Case,—the additional reason that certain damaging testimony was wrongfully admitted against him. None of these questions can be determined in the absence of the evidence, and appellee insists that the evidence is not in the record.

The record discloses that ninety days from the 3d day of July, 1900, were "given the official reporter to file his longhand manuscript of the evidence in the clerk's office," and "ninety days are also given defendants to file bill of exceptions." On the next following page appears a recital, without introductory words other than the title of the cause, to the effect that on the 29th day of September, 1900, Edward E. Neal, the duly appointed official reporter, who, as such reporter, was required by the presiding judge, and did take down in shorthand all the evidence and noted all rulings and exceptions, and upon request did prepare for the defendants a longhand transcript of all of said proceedings so taken and noted, and that such transcript was by said reporter filed with the clerk of the Hamilton Circuit Court on the 29th day of September, 1900, within the time fixed by the court, "and that the Honorable John F. Neal, judge of the Hamilton Circuit Court, thereupon attached to the said transcript of the evidence so filed by such reporter a certificate that the same is correct and contains all the evidence, which said transcript is in the words and figures following, to wit." Then comes the following entry: "This longhand report of the evidence filed in my

office this 29th day of September, 1900. H. W. Carey, Clerk." Then comes what purports to be the evidence given in the case. Following the evidence appears the signed certificate of Edward E. Neal, as official reporter, to the same facts recited in the introduction, and "that the above and foregoing transcript contains all the evidence given in said cause" dated "this the 29th day of September, 1900." Following the reporter's certificate the presiding judge "hereby certifies" that Edward E. Neal is the official reporter, that he was duly appointed and sworn as such faithfully to discharge his duties as a reporter in said cause, and as such reporter he did take down in shorthand all the oral evidence given in said cause, and all rulings and exceptions, and that the above and foregoing typewritten transcript prepared by him is correct, and contains all the evidence given in said cause. Signed "this the 29th day of September, 1900." This is followed with the certificate of the clerk to the correctness of the transcript and the genuineness of the signature of the presiding judge, and the record closes.

The document filed in the clerk's office by the reporter on September 29th, was in compliance with the order of the court that he should, within ninety days, file therein a longhand transcript of the evidence; and the proceedings with respect to this transcript, and the facts concerning the same certified by the judge, all clearly show that it was an attempt to bring up the evidence under the invalid §6 of the act of 1899 (Acts 1899, p. 384). See *Adams v. State*, 156 Ind. 596. This section of the act of 1899 contemplated a filing of the transcript in the clerk's office before approval and certification by the trial judge, and, this proceeding being under said act, we must presume, nothing appearing to the contrary, that the judge attached his certificate after the transcript was filed.

Although ninety days were granted defendants in which to file a bill of exceptions, it seems that no attempt was

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made to file such a bill. It has been decided by this court over and over again that, to bring up the evidence, the same must be incorporated in a bill of exceptions, which shall be examined and approved by the trial judge as a bill of exceptions, and when thus judicially perfected, filed in open court, or the clerk's office, as a part of the proceedings in the case, in accordance with the act of 1897. This has not been done, and the judgment must therefore be affirmed. See *Kirkman v. State*, 158 Ind. 156.

Judgment affirmed.

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[No. 19,874. Filed June 26, 1902.]

MORTGAGES.—*Release.*—*Penalty.*—*Corporations.*—Section 1105 Burns 1894, prescribing a penalty for failure of any "person" to release a mortgage of record after the same has been paid, does not apply to corporations.

From Vanderburgh Circuit Court; *H. A. Mattison*, Judge.

Action by Wilbur K. Morden against the Studebaker Brothers Manufacturing Company to recover the statutory penalty for failure of defendant to release a mortgage. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Reversed.*

W. W. Ireland and *Wm. Reister*, for appellant.

A. W. Funkhouser and *A. F. Funkhouser*, for appellee.

GILLET, J.—This case involves a question as to the construction of a statute. Appellee brought this action against appellant, a corporation, on the 18th day of August, 1900, to recover the statutory penalty and an attorney fee because of the omission of appellant to enter of record a release of a mortgage. Appellant filed a demurrer to the

complaint, but its demurrer was overruled, and it reserved an exception to such ruling. After issue joined, a trial was had that resulted in a finding and judgment in favor of appellee.

Appellant assigns as error the overruling of its demurrer to the complaint. The action was instituted under the act of February 18, 1893, Acts 1893, p. 64, §1105 Burns 1894. That act, aside from the title, reads as follows: "Be it enacted by the General Assembly of the State of Indiana, that any person being the owner or holder of any mortgage recorded in the State of Indiana, or the officer of any bank, loan association or other corporation being the owner or holder of any mortgage so recorded, or any administrator, executor, guardian, trustee, or other person whose duty it shall be to release any mortgage so recorded, who shall refuse, neglect or fail to release such mortgage of record when the debt or obligation which such mortgage was made to secure, shall have been paid or discharged, and he shall have been requested to release the same, shall forfeit and pay to the mortgagor or person having the right to demand the release of such mortgage, the sum of \$25, which sum may be recovered by suit in any court of competent jurisdiction, together with reasonable attorney's fees incurred in the collection of said penalty."

Appellant's counsel urge that a corporation is not liable to the penalty prescribed by the above statute, while it is claimed by appellee's counsel that the word "person" therein mentioned is a generic term that comprehends a corporation. We are unable to accept the latter view, as applied to the statute in question. Indeed, looking at the entire structure of the statute, the correctness of the position that a corporation is not amenable to the penalty that attaches to a violation of the act seems too plain to warrant elaboration in the decision of this case. We fully approve the reasoning of the Appellate Court upon this subject, in

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the case of *Southern Indiana, etc., Inst. v. Doyle*, 26 Ind. App. 102.

Judgment reversed. The trial court is directed to sustain appellant's demurrer to the complaint.

ADAMS ET AL. v. ALEXANDER, ADMINISTRATOR.

[No. 19,616. Filed June 27, 1902.]

DEEDS.—*Life Estate.*—*Remainder.*—*Construction.*—Upon the death of the father, intestate, the children quitclaimed their two-thirds interest in certain real estate to their mother for the term of her life conditioned that the mother would not convey or encumber the same, and would pay all the debts of her husband, and that at her death all of said real estate should go to the heirs of herself and husband. The mother by a writing, which was a part of the deed, and which was duly acknowledged, accepted the same and agreed to be bound by its conditions. *Held*, that the deed operated as a conveyance to their mother for her life of the two-thirds held by the children, and as a conveyance to them of her one-third, subject to an estate for her own life therein.

From Marion Circuit Court; *Vinson Carter*, Special Judge.

Petition by Melville C. Alexander, administrator of the estate of Cynthia F. Lankford against Eliza J. Adams and others to sell real estate. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed*.

A. F. Denny, for appellants.

H. E. Negley, J. A. Pritchard and D. A. Myers, for appellee.

DOWLING, C. J.—Cynthia F. Lankford died July 11, 1899, intestate, and owing debts. The appellee, as the administrator of her estate filed his petition in the Marion Circuit Court for an order to sell the undivided one-third of a tract of land in said county, if the court should find that the intestate was the owner thereof. The appellants, who were children and grandchildren of the intestate, or their grantees, and the husbands and wives of such of them

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as were married, were made defendants. The answer of the appellants denied the matters stated in the petition, and set up title in themselves. A demurrer to the affirmative answer was sustained. The cause was tried by the court, and a special finding of facts was made, with conclusions of law thereon. Exceptions by the appellants to each conclusion of law, and judgment for the appellee.

The principal question presented on this appeal is whether the intestate, by the instrument set out in the petition, conveyed to the appellants, or to some of them, her one-third interest in the land described. The instrument referred to is in these words: "This indenture witnesseth, that William R. Lankford and Mila Lankford, his wife, of Hamilton county; Eliza J. Adams and Woodford H. Adams, her husband, of Shelby county; Elizabeth Lankford, of Marion county; Nancy M. Sargeant and Oliver D. Sargeant, her husband, of Hamilton county; Thomas W. Lankford and Ida B. Lankford, his wife, of Marion county; Sarah F. Alexander and Melville C. Alexander, her husband, of Marion county,—and all of the State of Indiana; Martha E. Nelson and William H. Nelson, her husband, of St. Louis county, Missouri; Charles W. Lankford, of Marion county, Indiana, and Louisa B. Lankford, of Marion county, Indiana, release and quitclaim to Cynthia F. Lankford, of Marion county, Indiana, the following real estate in Marion county, in the State of Indiana, to wit: East half and south half of the west half of the southwest quarter of section sixteen, township sixteen, range four, containing 120 acres, to have and to hold during her natural life, and no longer; the consideration of said release and quitclaim being the agreement made by said Cynthia F. Lankford, and hereinafter set out; and the said Cynthia F. Lankford, in consideration of the above, and by the acceptance of this deed, *expressly agrees* that she will not in any way, directly or indirectly, encumber or convey any of said real estate, or suffer the

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same to be encumbered or conveyed, and that she will pay all taxes thereon accrued or hereafter to accrue, and that she will pay all of the indebtedness against the estate of her deceased husband, Thomas Lankford, and that at her decease all of said realty shall go and belong to the heirs at law of said Thomas Lankford and Cynthia F. Lankford, according to the laws of descent. It is hereby declared that the object of this instrument is to permit the said Cynthia F. Lankford to enjoy the possession and benefits of all of said estate during her natural life, and at the expiration thereof all of the same to go to said heirs at law. In witness whereof the said William R. Lankford, Mila Lankford, Eliza J. Adams, Woodford H. Adams, Elizabeth Lankford, Nancy M. Sargeant, Oliver D. Sargeant, Thomas W. Lankford, Ida B. Lankford, Sarah F. Alexander, Melville C. Alexander, Mary C. Miller, Jacob Miller, Martha E. Nelson, William H. Nelson, Charles W. Lankford, and Louisa B. Lankford have hereunto set their hands and seals this 7th day of June, 1883."

Here follow the signatures of William R. Lankford, etc., by each of whom the instrument was properly acknowledged before a notary public. Just below the certificates of acknowledgment is this agreement: "I accept this deed according to the conditions contained therein. Cynthia F. Lankford (X her mark). Subscribed and acknowledged by the said Cynthia F. Lankford before me, a notary public within and for Marion county, and the State of Indiana, this 7th day of June, 1883. John W. Bowlus, notary public."

The case is argued with great learning by counsel on each side, and we are referred to many authorities, ancient and modern, in support of their views. The rules by which we are to be governed in giving a construction to the instrument before us are clearly stated in the decisions of this court. It is said in *Davenport v. Gwilliams*, 133 Ind.

142, 145, 22 L. R. A. 244, that, "A deed should, if possible, be so construed that some effect will be given to it. It will be assumed that the parties did not intend that it should be a nullity, and did intend that it should be operative. It will be upheld rather than defeated." *Cates v. Cates*, 135 Ind. 272; *Spencer v. Robbins*, 106 Ind. 580; *Grigsby v. Akin*, 128 Ind. 591, 594.

We do not think the instrument is testamentary in its character, but believe it may fairly be construed as a deed. It has all the formalities of a deed, and it is evident that the parties intended it for a deed. The words, "and that at her decease all of said realty shall go and belong to the heirs at law of Thomas Lankford and Cynthia F. Lankford, according to the laws of descent," do not necessarily render the instrument testamentary. Similar recitals have been held to operate only as indicating that the grantee's use and enjoyment of the realty would not begin under the deed until after the death of the grantor. *Wilson v. Carrico*, 140 Ind. 533, 49 Am. St. 213, and cases cited.

Kelley v. Shimer, 152 Ind. 290, 291, states that, "The general rule laid down by the authorities is that a declaration that a deed shall not go into effect until the death of the grantor does not give it a testamentary character. Jones' Law of Real Property in Conveyancing, §527, and cases cited in notes. The cases decided by this court hold that recitals in deeds substantially the same as those in this case did not render such instruments testamentary in character, but that they conveyed an estate in fee simple when the instruments were executed, and that the only effect of such recitals was to reserve a life estate to the grantor, and thus postpone the possession of the grantee until after the death of the grantor."

The effect of the deed, as we think, is to reserve a life estate to Cynthia F. Lankford, and to convey the remainder in fee of the undivided one-third of the tract owned by her to the grantees. But even if the conveyance of the re-

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mainder is not to take effect until the death of Cynthia F. Lankford, it is valid under the statute which expressly provides that a freehold estate may be created to commence at a future day. §3379 Burns 1901, §2959 R. S. 1881 and Horner 1901; *Wilson v. Carrico*, *supra*; *Kelley v. Shimer*, *supra*; *Borgner v. Brown*, 133 Ind. 391, 394. The words "the said Cynthia F. Lankford, in consideration of the above, and by the acceptance of this deed, expressly agrees that * * * at her decease all of said realty shall go, and belong to the heirs at law of said Thomas Lankford and Cynthia F. Lankford," are sufficient to convey a remainder in fee. Considerable latitude is allowed in the creation of a remainder. It may be limited in the *habendum*, although not mentioned in the premises of the deed. *Wager v. Wager*, 1 S. & R. 373; *Wommack v. Whitmore*, 38 Mo. 448. The word "remainder" need not be used. *Wager v. Wager*, *supra*.

In *Prior v. Quackenbush*, 29 Ind. 475, a deed was made "to C and her heirs forever," and contained above the signature of the grantor the following clause: "N. B. Now, the foregoing * * * is * * * with this express condition, that foregoing described piece or parcel of land shall at the death of said *Catherine Roe*, be forever thereafter in Elizabeth Stewart and Louisa Stewart, and that they, the said Elizabeth and Louisa, are the only heirs contemplated in the foregoing deed.'" It was held that these words were sufficient to convey an estate in remainder, and that although the qualifying clause was found neither in the *habendum* nor the premises, but in the "note," yet it did not lose its effect, and divided the fee into a particular estate and remainder.

It is said by Mr. Washburn that, "The term remainder, it should be observed, is not one of art, which it is necessary to employ in creating an estate in expectancy, such as has been described. Any form of expression indicating the intention of the grantor or deviser to do this would be suffi-

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cient." 2 Washburn, Real Property (5th ed.), chap. 4, §1, p. 593. Citing 2 Cruise Dig., 203.

In *Borgner v. Brown*, 133 Ind. 391, and *Doren v. Gil-lum*, 136 Ind. 134, the words "go" and "go to" were held to evince the intention of the person using them that an estate should thereby pass. See, also, *Chambers v. Cham-bers*, 139 Ind. 111, 120. The deed is to be construed as if Cynthia F. Lankford had executed it as one of the parties to it. The agreement signed and acknowledged by her is in legal effect a part of the deed. By her written and formal acceptance of its conditions, she became bound pre-cisely as she would have been if named in the premises, and as if she had subscribed the instrument as one of the parties to it. The conditions upon which the deed was executed by the other parties, set forth in the instrument, became binding upon her, and operated to convey to the grantors the estate which the deed declared was "to go to and belong to them."

It is held in *Leach v. Rains*, 149 Ind. 152, that by the mere acceptance of a deed containing conditions, and tak-ing possession of the real estate conveyed by it, the grantee is bound by those conditions, even when they operate to release his interest in other real estat

The recital in the deed that at the death of Cynthia F. Lankford, the real estate described should go and belong to the heirs at law of Thomas Lankford and Cynthia F. Lank-ford, "according to the laws of descent," has no other effect than to indicate the proportions in which the grantees should take and hold the property; and by the "heirs of Thomas and Cynthia" must be understood the children of these persons. *Fountain County Coal, etc., Co. v. Beckle-heimer*, 102 Ind. 76, 78, 52 Am. Rep. 645; *Stevens v. Flan-nagan*, 131 Ind. 122, 127; *Hadlock v. Gray*, 104 Ind. 596; *Granger v. Granger*, 147 Ind. 95, 36 L. R. A. 186, 190.

It appears from the petition, the deed, and the special findings that the land described in the deed belonged to

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Thomas Lankford, and that on his death, which occurred May 11, 1883, the same descended one-third to his widow, Cynthia F., and the remaining two-thirds to his children. Less than one month after the death of Thomas all of his children, together with his widow, joined in the execution of the deed before us. The consideration upon which the children executed it was that their mother would not in any way, directly or indirectly, encumber the real estate, or suffer the same to be encumbered or conveyed; that she would pay all taxes thereon accrued, or thereafter to accrue; that she would pay all the indebtedness of her said husband, and that, at her death, all of said real estate should go and belong to the heirs at law of the said Thomas and Cynthia. The latter, by a writing which was a part of the deed, and which was duly acknowledged by her, accepted the same, and agreed to be bound by its conditions. The expressed object of the deed was to permit the widow to enjoy the possession and benefit of the said real estate during her natural life, and to secure the remainder to the children of Thomas and Cynthia. In pursuance of the terms of the deed, the widow took possession of the entire tract, and enjoyed the possession and benefits thereof for the entire term of her life,—a period of more than sixteen years. She died July 11, 1899. It does not appear that she had violated any of the conditions of the deed by a failure to pay the taxes on the land and the debts of her husband, or by encumbering or conveying her estate for life by mortgage, judgment, or other lien, or by any lease or conveyance of the same. The deed was placed upon record, and several conveyances of the interests in remainder were made by the children, and these, too, were duly recorded.

The words of the instrument and the conduct of the parties leave no room for doubt as to their intention that the deed should operate as a conveyance to their mother for her life of the two-thirds held by the children, and that it

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should operate equally as a conveyance to them of her one-third, subject to an estate for her own life therein. Such being the plain intention of the parties, and this intention having been acted upon by them for so many years, no inflexible rule of construction compels us to defeat the objects of the deed by holding inoperative that part which is most material to the children and grantors of the life estate in the undivided two-thirds. The mother received and had the benefit of every provision in her favor. As far as it was possible for her to do so, she seems to have performed every covenant in favor of her children. On her death, the law executed the remaining condition, and her grantees, as remainder-men, became vested with the right to the possession as well as the fee.

The court, therefore, erred in its conclusions of law, and for these errors the judgment is reversed, with instructions to restate the conclusions of law, and to render judgment for the appellants.

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[No. 19,825. Filed June 27, 1902.]

TAXATION.—Newspapers.—Good-Will.—Constitutional Law.—The good-will that attaches to the business of conducting a newspaper belonging to a copartnership is not, in and of itself, property, within the meaning of the constitutional mandate requiring the General Assembly to provide for a uniform system of taxation of all property, except certain property that may be exempted by law. *pp. 184-188.*

SAME.—Newspapers.—Good-Will.—Statute.—The general act concerning taxation, §8408 *et seq.* Burns 1901, being silent on the subject of taxation of good-will, declaring in §8410 that "all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation," and §8411 providing that personal property shall include certain described property, not mentioning good-will, does not authorize the taxation of the good-will of a newspaper. *pp. 188-190.*

SAME.—Newspapers.—Good-Will.—No method is provided by law for the taxation of the good-will of a newspaper, since good-will is an incident of the business as a going concern, and the tax law

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159	398
159	182
161	261
161	430
159	182
164	430

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169	660
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requires that the various items constituting a newspaper plant must be assessed separately. *pp. 191, 192.*

TAXATION.—*State Board of Tax Commissioners.—Review of Acts by Court.*—

Where the state board of tax commissioners has determined that shares of stock held by a company have a certain taxable value, such action, in the absence of fraud, is not reviewable by the courts. *pp. 192-194.*

SAME.—*State Board of Tax Commissioners.—Injunction.*—Where the state board of tax commissioners acts without jurisdiction, the courts have the power to arrest the consequences of its acts. *pp. 194-197.*

SAME.—*Injunction.—Collateral Attack.*—The proceeding to enjoin the state board of tax commissioners from taxing the good-will of a business being informal, the rule that obtains requiring that the infirmity appear on the face of the record in a collateral attack does not apply. *p. 197.*

SAME.—*State Board of Tax Commissioners.—Increase of Assessment.—Injunction.*—Where part of an increased assessment made by the state board of tax commissioners was legal and part illegal, and there is no means of ascertaining the amount of the legal portion, the whole increase was properly held to be invalid. *pp. 197, 198.*

CONSTITUTIONAL LAW.—*Courts.*—The Supreme Court will not decide a constitutional question when it can perceive another ground on which it can properly rest its decision. *pp. 198, 199.*

From Marion Superior Court; *J. L. McMaster*, Judge.

Suit by Delavan Smith and Charles R. Williams to enjoin William H. Hart, Auditor of State, from certifying an assessment to the auditor of Marion county made by the state board of tax commissioners against the Indianapolis News Company and also to enjoin the treasurer of Marion county from collecting the tax. From a judgment in favor of plaintiffs, defendants appeal. *Affirmed.*

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley*, *M. M. Hugg* and *Frank McCray* (*amicus curiæ*) for appellants.

F. Winter and *Clarence Winter*, for appellees.

GILLET, J.—This suit involves the validity of an assessment for taxation, made, on appeal, by the state board of tax commissioners against appellees, Delavan Smith and Charles R. Williams, as partners, engaged in the publication of a newspaper, known as the Indianapolis News, under the name and style of the Indianapolis News Company.

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The state board added to appellees' assessment of \$47,657.31, based on their accounts and tangible personal property, the latter being itemized, the additional sum of \$352,340, without in any manner indicating what items, if any, it applied to, and it is charged, in effect, that said increased assessment was based on the good-will of appellees' said business, and on its membership in a news gathering corporation, known as the Associated Press, which membership it may be inferred, although the allegations of the complaint are somewhat vague upon the subject, was based on appellees' ownership of eight shares of the stock of said corporation. It is not necessary to set out any further averments of the complaint, as the case, except as hereinafter mentioned, has been argued on the substantial question as to the authority of the state board in the premises. Appellants demurred to the complaint below, their demurrer was overruled, and they excepted. As they elected to abide their demurrer, and declined to plead further, a decree was rendered in appellee's favor.

We address ourselves first to the determination of the question whether the good-will of the Indianapolis News Company is subject to taxation. The power of taxation is one of the highest attributes of sovereignty. When society erects a state, creating the three great departments of government,—the legislative, the executive, and the judicial,—it is not necessary to grant to the legislative department the power of taxation; for, in the absence of other restriction, that authority vests in the legislative department by virtue of the general grant of legislative power. *State, ex rel., v. Smith*, 158 Ind. 543; *State Board, etc., v. Holliday*, 150 Ind. 216, 42 L. R. A. 826. The Constitution of Indiana ordains that, "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, lit-

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erary, scientific, religious, or charitable purposes as may be especially exempted by law." Art. 10, §1. This provision requires all property, not especially authorized to be exempted, to be taxed, but beyond it there is room for the abundant exercise of legislative authority. Indeed, the question as to the right to subject good-will to the burden of taxation is not a question of legislative power, but a question of legislative will.

If it be granted that good-will is property, yet it cannot be taxed unless the General Assembly has authorized it. Notwithstanding the constitutional requirement as to the taxation of property, such provision is not self-executing, and a tax can not be laid unless the General Assembly selects the particular species of property to bear the burden of taxation. *Riley v. Western Union Tel. Co.*, 47 Ind. 511; *Hyland v. Brazil Block Coal Co.*, 128 Ind. 335; *State Board, etc., v. Holliday, supra*. So, in any event, the question is one of legislative intent. If, however, good-will is property, and, therefore, ought to be taxed, then, in the construction of the legislative scheme of taxation, we ought to impute to the General Assembly an intent to obey the constitutional mandate, if its enactments fairly admit of such a construction. *Orr v. Baker*, 4 Ind. 86; *Trustees, etc., v. Ellis*, 38 Ind. 3; *Read v. Yeager*, 104 Ind. 195. We therefore proceed to an examination of the question whether good-will is property. Despite the almost universal recognition at the present day of good-will as in the nature of property, the law on this subject is of comparatively recent growth. The cases greatly confound the thing itself with the means of transferring it, and with the rights an assignee acquires in order to effect that transfer. There is a kind of local good-will, that Lord Eldon characterized as "nothing more than the probability, that the old customers will resort to the old place." *Cruttwell v. Lye*, 17 Ves. 335, 346. Good-will of this character may inhere in real property and give to it additional value. As civiliza-

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tion became more complex, the realization was forced upon the courts that the right to carry on an established business, and to represent, that it is the old business that is carried on, is often a thing of value, since men were willing to pay for the privilege and contended for it at the forum, and therefore the courts have, by evolutionary processes, so adjusted themselves to conditions as to treat such privileges, even where not connected with real estate, as in the nature of assets. The trend of authority is that they will be so regarded and protected, not only where they are made the subject of express contract in connection with the voluntary sale or the bequest of a business, made in connection with the disposition of property, but, except where the business is of a purely personal character, depending for its existence solely upon the skill of the person carrying it on, that such interests will be protected in the winding up of partnership affairs and in cases of compulsory sales. On many questions relative to the disposition of these interests there is a most distressing conflict and uncertainty in the adjudged cases, and we have no disposition to tempt such a field. Some of the cases seem to treat good-will as property, while in other cases courts have attained the result by the exercise of control over the assignor. In cases of voluntary transfers this seems eminently proper, since it is not honest to sell the custom and steal away the customers; to pocket the price, and then to recapture the subject of the sale. See *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. 442; *Trego v. Hunt*, (1896) App. Cas. 7.

We regard it as clear, however, that good-will is not in and of itself property, but that it is an incident that may attach to, or, in some cases, be connected with it. In *Rawson v. Pratt*, 91 Ind. 9, 16, it was said: " 'Good-will,' as property, is intangible, and merely an incident of other property. It was not in this case an incident of the stock of hardware, tools, and machinery, which seem to have been

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the only tangible property purchased by the appellants from the appellees." In our judgment, in a case of this kind the transfer of a good-will, involving the right to carry on the old business and to represent that it is the old business that the purchaser is carrying on, is really based, not so much on the sale of the property that is itself conveyed, as it is upon the sale of the business as a going concern. This seems to be the view of the Supreme Court of the United States, as expressed in *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 446, 13 Sup. Ct. 944, 947, 37 L. Ed. 799, where it was said: "Undoubtedly, good-will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. * * * As applied to a newspaper, the good-will usually attaches to its name rather than to its place of publication." Assuming these statements of the federal supreme court to be the law, as we are disposed to, and it will be realized how shadowy a thing a good-will is in the case of a newspaper. As Professor Parsons said, in his work on *Partnership* (4th ed.), §181: "The only proper signification of the word must be, that benefit or advantage which rests only on the *good-will*, or kind and friendly feelings of others. * * * It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period, and been promoted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope, grounded on a probability."

In the case of a good-will attaching to real property, the good-will becomes an integral part of the value of such property, and, in the case of a corporation possessing a good-will, the value thereof may find a reflex in the value

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of its shares of stock. We hold, however, that the good-will that attaches to the business of conducting a newspaper belonging to an individual or a copartnership is not, in and of itself, property within the meaning of the constitutional mandate; and while it might be taxed, since the law protects it, yet the *a priori* argument, that the Constitution commands it to be taxed, is gone. We think that this is the proper doctrine in all such cases, where good-will does not inhere in particular, tangible property. We therefore approach the question, whether, in the absence of a constitutional requirement that such an interest should be taxed, there is otherwise to be found in existing legislation language that, of its own force, warrants such a conclusion.

Taxes are burdens that must necessarily be laid, and the government is not to be regarded as a public enemy in imposing them. Such laws ought not to be construed from the standpoint of the taxpayer alone or of the government alone. The real question is, what was the intent of the General Assembly. Whatever may be the rule in the construction of the federal revenue laws, where severe penalties and forfeitures are often attached, we think, that, under a revenue system like ours, it is the duty of the courts, even in construing statutes providing for taxation that go beyond the constitutional requirement that all property shall be taxed, to construe such statutes without bias or prejudice, and that in such cases the courts should only lean towards strictness to the extent that it is justifiable on the ground that it is to be fairly and justly presumed that the General Assembly, which possesses a power so comparatively unrestrained in its force and searching in its extent as the power of taxation, has so shaped the law as, without ambiguity or doubt, to bring within it everything that it was meant should be embraced. *United States v. Breed*, 1 Sumn. 159; *United States v. Sapinkow*, 90 Fed. 654; Cooley, Taxation (2d ed.), 273.

It is contended by the learned Attorney-General that the

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assessment of good-will is warranted, as property, under the general act concerning taxation. We have heretofore expressed our view that good-will is not property in the ordinary sense of the term, but we proceed to examine the act itself. By such act the General Assembly has provided for the taxation of polls and property. It is declared that "all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation." §8410 Burns 1901. The next section provides that personal property shall include certain described property, not mentioning good-will. We think that this section, whereby the General Assembly undertakes to define real and personal property for the purposes of taxation, affords strong evidence that it was not intended to tax good-will in a case like this. The maxim *expressio unius est exclusio alterius* is quite applicable in view of the legislative definition. The entire act is silent on the subject of the taxation of good-will, as an incident to personal property or otherwise, as applied to any such case as this; and the conclusion that good-will, as such, is to be taxed could only be arrived at by interpreting the act with a mind bent on squeezing everything out of it that its words do not necessarily withhold. Certainly, as applied to a case not within the sweep of the constitutional requirement, this is not a justifiable method of interpretation.

As said by Mr. Justice Story, in *United States v. Wigglesworth*, 2 Story 369, 373, Fed. Case No. 16,690: "It is, as I conceive, a general rule in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy." As more tersely expressed by Mr. Justice Nelson: "Duties are never imposed on the citizen upon vague or doubtful interpretations." *Powers v. Barney*, 5 Blatchf. 202, 203, Fed. Case

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No. 11,361. This expresses the views of the courts generally. *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 7 Sup. Ct. 1240, 30 L. Ed. 1012; *American, etc., Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821; *Adams v. Bancroft*, 3 Sumn. 384, Fed. Case No. 44; *Sewall v. Jones*, 9 Pick. 412; *Vicksburg, etc., R. Co. v. State*, 62 Miss. 105; *Mayor, etc., v. Hartridge*, 8 Ga. 23; *Dean v. Charlton*, 27 Wis. 522; *Gurr v. Scudds*, 11 Exch. 190; *Wroughton v. Turtle*, 11 Mees. & Wels. 561; *Williams v. Sangar*, 10 East 66; *Denn v. Diamond*, 4 Barn. & Cr. 243; *Tompkins v. Ashby*, 6 Barn. & Cr. 541; *Oriental Bank v. Wright*, L. R. 5 App. Cas. 842; *Pryce v. Directors, etc.*, L. R. 4 App. Cas. 197; *Daines v. Heath*, 54 Eng. C. L. 938; *Gosling v. Veley*, 64 Eng. C. L. 328, 407; Potter's *Dwarris*, Stat., 255.

It would be against usage to tax the good-will of a partnership or individual. It is to be presumed that the General Assembly was familiar with the fact that it had been the practice to omit to tax good-will in such cases, and, if it had been its purpose so to do in the enactment of the general tax law of 1891, the circumstances called upon that body to give clear expression to its purpose. Its omission in that particular can only be construed as an acquiescence in the practice that before obtained. *State Board, etc., v. Holliday*, 150 Ind. 216, 42 L. R. A. 826. The reasons that we have thus far advanced against the construction of the taxation act that appellants contend for, may, in a substantial sense, be said to be a reiteration of the following language of Lord Denham, C. J., in *Burder v. Veley*, 12 Ad. & E. 233, 247: The law requires clear demonstration that a tax is lawfully imposed. No act of parliament vests in the parish officers such a power as these have exercised, or recites that such a power exists by common law or custom. No book of reports affirms it. No such usage in fact prevails in the land. An opposite usage prevails."

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Nor can we uphold the assessment as a tax on the property as a unit. In the case of a good-will that is an incident of land, the increased value inheres in the property itself; and, in the case of most domestic corporations, that which the law assesses,—their stock,—if worth more than their tangible property, stands for all that the corporation represents, including good-will. It is provided by statute that, for the purpose of assessing property for taxation, a copartnership shall be treated as an individual. §8423 Burns 1901. In either case the schedule contemplates that the various items shall be assessed separately. Even if good-will were regarded as an incident of personal property, it can not be said that any one item of such property—as, for instance, a printing press—is worth any more because it belongs to one person than if it belonged to another. If there is a good-will that can be said to be an incident of personal property at all, it must be an incident of the assembled items of personal property that may be said to constitute the tool or implement wherewith the business is carried on, and our revenue law can not be tortured into a construction that authorizes an aggregating of personal property. Such property, upon the plain reading of the schedule, is required to be distributed among the appropriate items thereof. The good-will of a newspaper, conducted by an individual or copartnership, is an incident of the business as a going concern, and, as the business can not be treated as a unit, it follows that this is a case where the General Assembly has omitted to provide a regulation whereby good-will can be taxed. *State Board, etc., v. Holliday*, 150 Ind. 216, 42 L. R. A. 826. The case of *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, s. c. on petition for rehearing, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965, cited by appellants' counsel, is not in point. That case settles the proposition that it is competent, under statutory authority, to tax

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as a unit a going concern, yet the case really depends upon the fact that the State has enacted such legislation.

As to the element of appellees' holding of shares of stock in the Associated Press, we are of opinion that if the case rested alone upon the complaint that appellees' shares therein were taxed, no case would be presented for our interference. We do not doubt, if a number of newspapers enter into an agreement that each will provide the others with news, or that through a common agency such news is to be supplied to all, that the right under such contract is not a subject of taxation under existing statutes. Just what connection, if any, the shares of stock that appellees hold has with the privilege of receiving news, does not appear; and we are not advised as to what service, if any, appellees perform as payment, in whole or in part, for the advantage that they receive. The fact, as pleaded, that the court of last resort in the state where such corporation is organized has held that it is bound to furnish its news to all who apply, on the same terms that it exacts from its members, may be an important element tending to depreciate the value of such stock; but we can not therefore say that the stock has no value, since a person who had regularly acquired stock in the corporation might thereby without contest receive the attendant privilege upon the terms fixed, while an outsider might have to vindicate his right, if any, by a long contest in the courts.

Section 8410 Burns 1901, that is quoted above, provides that all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation. The next section contains a definition of personal property for the purposes of taxation, and among other items of personal property therein mentioned is included "all shares in foreign corporations, except national banks, owned by inhabitants of this State." The listing of such shares is also provided for by the schedule. §§8460, 8463 Burns 1901. Mr. Cook, in his valuable work on Corporations, volume 2

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(4th ed.), §565, says: "It is undoubtedly within the constitutional power of the legislature of a state to enact a statute that persons residing in that state, who are stockholders in a corporation created by another state, shall be taxed on their shares of stock at their residence within the former state. This principle of law is based on the fact that shares of stock are personal property; that they are distinct from the corporate property, franchises, and capital stock; that they follow the domicile of their owner like other personal property, and that consequently he may be taxed therefor wherever he may reside. It accordingly is a question of policy and expediency with a state whether or not it will tax its citizens who are stockholders in foreign corporations."

It is not material that the shares of stock, as such, do not directly earn money. If the holding of such shares is the basis of a privilege that in and of itself is worth money, we see no reason why such value should not inhere in such shares. The fact that the right, if any, the stock represents can not be transferred without the consent of the Associated Press may take from the stock a market value, but it may have a value nevertheless. Section 8458 Burns 1901 provides that in determining the value of personal property the township assessor "shall be governed by what is the true cash value, such being the market or usual selling price at the place where the property shall be at the time of its liability to assessment, and if there is no market value, then the actual value." We take it, however, that counsel for appellee would not dispute the proposition that if the shares of stock have any value they are subject to taxation. Counsel evidently rely upon the averment that the shares of stock "have no market value and no actual value." If this were true, we admit that such shares ought not to be taxed. But whether they had or no is a question of fact that the state board—a body having *quasi* judicial

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powers—was required to determine; and if, without fraud, that body has determined that such shares had a value, then this court has no power to review such conclusion. *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625, 653, s. c. 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Youngstown Bridge Co. v. Kentucky, etc., Co.*, 64 Fed. 441; *McLeod v. Receveur*, 18 C. C. A. 188, 71 Fed. 455; *State Railroad Tax Cases*, 92 U. S. 575, 610, 23 L. Ed. 663; *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553.

As said by Mr. Justice Magruder, in *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, 12, 58 N. E. 418: "The determination of the value to be fixed on property liable to be assessed 'is not, in the absence of fraud, subject to the supervision of the judicial department of the state.'" The state board may have made a mistake of fact in determining the value of such shares of stock, but we can not relieve on that ground alone. In *McLeod v. Receveur*, *supra*, an assessment by said board was attacked on the ground that a bridge over the Ohio river was assessed at \$200,000, when its real value, in so far as it was within the State of Indiana, was only \$45,000. It was further alleged that such assessment was made by the state board by mistake and misrepresentation as to the southern boundary of the State at that point. In disposing of the question the court said: "Here there is no suggestion of fraudulent conduct upon the part of the board of equalization. Its officers were charged with the duty of assessing the value of the property of the bridge company lying within the State of Indiana. They did not seek or attempt to make any assessment upon property without the boundaries of the State. It was their duty to ascertain the extent of the property of the bridge company lying within the State, and to declare its fair value. It is, in effect, charged that they committed an error of judgment, being misled to believe that the boundary line of the State was below low-water mark in the Ohio river, and so placed upon the property lying within

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the State a greater valuation than they otherwise would have done; in other words, that, through a mistake of fact and error of judgment, the property of the bridge company lying within the State was excessively valued. The board of equalization had, however, jurisdiction of the subject-matter, and, as observed by Chief Justice Ryan, 'had jurisdiction to commit the error;' and its determination, however erroneous, can not be impugned collaterally. Jurisdiction existing, any order or judgment is conclusive in respect of its own validity in a dispute concerning any right or title to be derived through, or anything done by virtue of, its authority. It is true that, with respect to these special tribunals for assessment of property, evidence of excessive valuation is sometimes admitted; but it is so received in connection with other testimony to establish a charge of fraudulent conduct on the part of the board." Judge Showalter dissented in the above case on the ground that the state board had no jurisdiction to assess property in Kentucky, but the case probably rests on the ground, expressed in the opinion, that the board "did not seek or attempt to make any assessment without the boundaries of the State."

The questions involved in this case that have been argued by the respective parties have been questions that went to the merits of the right of the state board of tax commissioners to tax the appellees, and, as the parties stand in the attitude of waiving all other questions, we have been disposed to consider, so far as we could properly do so, the substantial questions in the case, but it is insisted by an *amicus curiae*, who, by leave of court, has filed a brief, that the effort of such board to tax the good-will of appellees' business ought also to be upheld, because this proceeding is a collateral attack on the action of the board. Although such board is composed of men who, for the most part, otherwise occupy high official station, and although such board performs duties of very great importance to the

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State, yet such tribunal is nevertheless one of granted powers; and, if it acts without jurisdiction, the courts have power to arrest the consequences of its acts. In *State Board, etc., v. Holliday*, 150 Ind. 216, 42 L. R. A. 826, this court sustained a proceeding to enjoin the state board from listing and valuing the life insurance policies for taxation that were held by the appellees in said action. In *Senour v. Ruth*, 140 Ind. 318, 321, this court, in answer to the claim that the appellee therein was precluded by the action of the county board of review, said: "When we have found that the property was not within the jurisdiction of the State, we have found the absence of an element necessary to the validity of the board's action, and, in such case, the action is void, and may be attacked collaterally." The proposition that courts may relieve from assessments laid without jurisdiction finds support in the authorities without this State. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118; *Central Pac. R. Co. v. California*, 162 U. S. 91, 114, 16 Sup. Ct. 766, 40 L. Ed. 903; *St. Mary's Gas Co. v. Elk County*, 191 Pa. St. 458, 43 Atl. 321; *Keokuk, etc., Bridge Co. v. People*, 161 Ill. 132, 43 N. E. 691; *Maxwell v. People, ex rel.*, 189 Ill. 546, 59 N. E. 1101; *Montis v. McQuiston*, 107 Iowa 651, 78 N. W. 704; *Poe v. Howell* (New Mex.), 67 Pac. 62; *State v. Ernst*, (Nev.), 65 Pac. 7. In *Central Pac. R. Co. v. California*, *supra*, the Supreme Court of the United States, said: "Undoubtedly if the board of equalization had included what it had no authority to assess, the company might seek the remedies given under the law to correct the assessment, so far as such property was concerned, or recover back the tax thereon, or, if those remedies were held not exclusive, might defend against the attempt to enforce it." Judge Cooley recognizes that the courts may relieve from an assessment when some principle of law is violated in making it, and when the complaint is not merely

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of an error in judgment. Cooley, Taxation, 748, 777, and notes on pp. 750, 776.

We think that in a case of this kind it is not proper to apply the rule that obtains when a judgment of a court of general jurisdiction is collaterally attacked,—that the infirmity must appear on the face of the record. These proceedings are summary and, to a large extent, informal, and there are no pleadings that tend to make the question decided certain. It is proper, in a case like this, where values have not been extended on the specific items of the taxpayer's schedule, to show affirmatively that he was assessed with an item that was not taxable under the laws of the State. This could be done without contradicting in any way the record that the board made, if we may assume that the averments of the complaint are true. The following cases, by implication, at least, support this view: *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Central Pac. R. Co. v. California*, 162 U. S. 91, 112, 16 Sup. Ct. 766, 40 L. Ed. 903, S. c.; *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905.

In *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118, the question was whether the state board of California had included within the assessment of defendant in error certain fences along its right of way that the board had no power to assess against it. No record of the assessment as made by the board was introduced, and no other documentary evidence of such assessment was offered, except the official communication of said board to the local assessor, which showed only the aggregate valuation of the company's franchise, roadway, roadbed, rails, and rolling-stock. The trial court made a special finding, in which it found that said board "did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said railway and the land of coterminous proprietors."

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In passing upon the question thus presented the Supreme Court, at page 415, said: "It appears, as already stated, from the evidence, that the fences were included in the valuation of the defendants' property; but under what head, whether of franchise, roadway, or roadbed, does not appear. Nor can it be ascertained, with reasonable certainty, either from the assessment roll or from other evidence, what was the aggregate valuation of the fences, or what part of such valuation was apportioned to the respective counties through which the railroad was operated. If the presumption is, that the state board included in its valuation only such property as it had jurisdiction under the state constitution to assess, namely, such as could be rightfully classified under the heads of franchise, roadway, roadbed, rails, or rolling-stock, that presumption was overthrown by proof that it did, in fact, include, under some one or more of those heads, the fences in question. It was then incumbent upon the plaintiff, by satisfactory evidence, to separate that which was illegal from that which was legal—assuming for the purposes of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty of tendering, or enabling the court to render judgment for, such amount, if any, as was justly due." It was further held by the court that the whole assessment was invalid, as it could not be determined what was the amount of that part of the assessment that was valid.

It is our conclusion, as it is alleged that the good-will of appellees' business was assessed, and as there is no means of determining the amount of that portion of the increase that the state board of tax commissioners had authority to add, that the action of said board as an entirety, in so far as it added to appellees' assessment, was properly held to be invalid.

Appellees' counsel have argued the question as to an unlawful discrimination against appellees in the administra-

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tion of the tax laws. It is settled that the court will not decide a constitutional question when it can perceive another ground on which it can properly rest its decision. We therefore decline to consider this question.

Judgment affirmed.

BRUNING v. GOLDEN, SPECIAL ADMINISTRATOR.

[No. 19,860. Filed June 27, 1902.]

EXECUTORS AND ADMINISTRATORS.—*Special Administrator.*—*Action Against Surviving Partner.*—*Costs.*—A special administrator appointed under §2393 Burns 1901 has authority to bring an action for an accounting against a surviving partner, and if the suit is in good faith he is not personally liable for costs. *pp. 203, 204.*

SAME.—*Costs.*—*Judgment.*—*Collateral Attack.*—A judgment for costs against an administrator in his fiduciary capacity is not subject to collateral attack. *p. 204.*

SAME.—*Costs of Litigation.*—Where an administrator exercises reasonable care and in good faith prosecutes and defends cases in the interest of the estate he is entitled to have costs and reasonable expenses allowed as credits in his settlement. *p. 204.*

SAME.—*Special Administrator.*—*Suit for Benefit of Estate.*—*Costs.*—B died testate, making his two children, a son and a daughter, beneficiaries. Prior to testator's death he and his son were partners in business. A special administrator appointed by the court after the probate of the will brought suit against the son for an accounting of the partnership business. *Held*, that the suit was for the benefit of the estate, and not for the daughter, and that the special administrator was not liable individually for costs. *pp. 208-211.*

From Jefferson Circuit Court; *W. H. Watson*, Special Judge.

Exceptions by William H. Bruning to the final report of John M. Golden, special administrator of the estate of John F. Bruning, deceased. From a judgment for the administrator, the exceptant appeals. Transferred from the Appellate Court, under §1337u Burns 1901. *Affirmed.*

L. V. Cravens, A. G. Smith, C. A. Korbly, F. Winter and C. Winter, for appellant.

W. T. Friedley and John McGregor, for appellee.

MONKS, J.—Appellant, as executor of the last will of John F. Bruning, deceased, and as legatee and devisee of

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said testator, filed exceptions to the partial and final reports of appellee, special administrator of said estate. The trial of said cause resulted in a finding, and, over a motion for a new trial, a final judgment approving said settlements, with costs against appellant, after the withdrawal of an item of \$10 claimed as a credit.

It appears from the record that John F. Bruning died testate in Jefferson county, Indiana, October 6, 1891, leaving as his only heirs at law two children,—appellant and Clara Copeland. The debts of the deceased, including funeral expenses, were paid by said heirs. In 1893 there was a disagreement between appellant and his sister, and appellant offered said will for probate. Before its probate, objections thereto were filed by Clara Copeland, as provided by law, issues were formed, the venue changed, and the case finally tried in 1898, and the will admitted to probate in Jefferson county, in October, 1898. On July 29, 1893, Clara Copeland commenced an action in the Jefferson Circuit Court against appellant for an accounting of the partnership affairs of John F. Bruning & Son, of which firm John F. Bruning in his lifetime and appellant were the only members. This suit was removed to the circuit court of the United States by appellant, and dismissed by the plaintiff Clara Copeland, on June 12, 1895. While said action and the action to contest the will were pending, Clara Copeland filed in the Jefferson Circuit Court a verified application setting forth the death of John F. Bruning, the will contest, and the fact that there was a large amount of property then involved in litigation in the United States Circuit Court; that the household and kitchen furniture and other personal property of the deceased needed care. It was also stated in the application that there was a suit pending in the United States Circuit Court, wherein said petitioner was plaintiff and appellant was defendant, brought to settle the partnership of John F. Bruning & Son and have an

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accounting therein, and that she had been advised by her counsel that, before said cause could be disposed of, an administrator of the estate of John F. Bruning must be made a party thereto. Clara Copeland was, by said court, appointed special administratrix of said estate.

On September 1, 1894, said administratrix resigned and filed a statement showing that she had received nothing as such administratrix and incurred no expense, except her appointment. On the same day, appellee was appointed special administrator of said estate. His application for said appointment was substantially the same as that of Clara Copeland. In October, 1894, appellee filed an inventory of the household goods, which were appraised at \$433.83. He afterwards, on July 19, 1895, filed a petition, and procured an order of court to sell the same. In 1896, pursuant to said order, appellee sold said household goods, —appellant buying a part thereof,—which sales were approved by the court. Said appellee was informed that appellant and his father were engaged in business as partners under the name of John F. Bruning & Son, and that there was an unsettled partnership account between said estate and appellant, upon the settlement of which there would be due said estate a large sum; and he was advised by his counsel that it was his duty to bring suit against appellant for an accounting and to collect the same.

On June 27, 1895, after the case of Clara Copeland against appellant in the United States Circuit Court had been dismissed, under advice of his counsel, appellee commenced said action against said appellant and made Clara Copeland and her husband parties thereto, to answer to their interest in certain alleged partnership real estate in which said Clara Copeland claimed an adverse interest. By the issues in said cause, the questions were raised: (1) Did John F. Bruning, in 1889, sell all of his interest in the partnership property of the firm of said John F. Bruning & Son to the appellant? (2) If he did, was he at the

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time a person of unsound mind? (3) Was said contract made by said John F. Bruning, secured by undue influence on the part of appellant, or any one on his behalf?

The venue in said case was changed to Jennings county, where a trial of the cause resulted in a judgment in favor of appellant against appellee for costs, payable out of the assets of the estate of John F. Bruning, deceased; the court finding and adjudging all of said issues in favor of appellant, thus establishing said contract of 1889, under which appellant claimed to own all the partnership property. Appellant moved the court to modify said judgment for costs so as to make the same a personal judgment against John M. Golden, and not payable out of the assets of said estate, which motion was overruled.

The items in the partial and final reports of appellee to which appellant filed exceptions were for the expenses incurred and paid in the sale of said personal property, and stenographer's fees, abstract fees, and court costs paid in the case against appellant for an accounting above mentioned, and for appellee's services as special administrator. Each of said items of expense was excepted to by appellant on the grounds: "(1) That said special administrator had no power or authority in law to sell said personal property for any purpose; (2) that there was no necessity for such sale, because there were no debts of said decedent, or expenses of administration, requiring such sale; (3) that said suit was not within the purview of said special administrator's duties, and was prosecuted by him for and on behalf of said Clara Copeland, and without any sufficient *prima facie* ground, and not for the benefit of said estate."

It is evident from the record that the court below found that John M. Golden, appellee, was appointed special administrator of said estate under the provisions of §2393 Burns 1901, §2239 R. S. 1881 and Horner 1901, and not under §2391 Burns 1901, §2237 R. S. 1881 and Horner 1901. The application for the appointment of said Golden

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showed that John F. Bruning died testate, and that his will was being contested, and authorized the appointment under §2393, *supra*.

We think the court was fully justified in finding that appellee was appointed special administrator of said estate under said §2393, *supra*, which provides: "When any person shall have died testate, and notice of contest of the will of said testator shall have been given, as required by law, it shall be lawful for the proper court to appoint a special administrator, who shall proceed to collect the debts due said testator, by suit or otherwise, and to sell the personal property of said testator, and also to pay the claims against his estate, in the same manner and under the same regulations as are now required of administrators of intestates, so far as the same may be done consistent with the terms of such will." This section was enacted in order that actions to contest wills might not unnecessarily delay the settlement of estates. It should receive a construction consistent with such intent. Under its provisions a court may appoint a special administrator whose duty it is to proceed with the collection of debts, the sale of personal property, and the payment of claims against the estate, the same as is required of an administrator of an intestate, and have the same as near ready for settlement and distribution by the time the will contest is determined, as is possible. Said section expressly authorized appellee, as special administrator, to sell the personal property of said deceased.

A general administrator has power to collect debts due the deceased, by suit or otherwise. This includes the power to bring an action for an accounting against a surviving partner, or to set aside transfers of personal property made by the deceased during his lifetime, on account of his unsoundness of mind, or the same having been obtained by undue influence or fraud. 2 Lindley, Part. (Am. ed.), 492, 493; Parsons, Part. (4th ed.), §406; Collier's Law

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of Part., 286; George, Part., 334, and note 112; 17 Am. & Eng. Ency. Law. 1277; Schouler's Exrs. and Adm. (2d ed.), §§252, 296; Croswell's Exrs. and Adm. (1897), 236; *Scars v. Carrier*, 86 Mass. 339; *Derrick v. Emmens*, 14 N. Y. Supp. 360; *Eubanks v. Dobbs*, 4 Ark. 173. By said §2393 Burns 1901, §2239 R. S. 1881 and Horner 1901, the same power is given to special administrators appointed under the provisions thereof. *Tomlinson v. Wright*, 12 Ind. App. 292, and *State, ex rel., v. Tomlinson*, 16 Ind. App. 662, 59 Am. St. 335, cited by appellant, were decided under said §2391 Burns 1901, §2237 R. S. 1881 and Horner 1901, and are not in point here.

It is the duty of an administrator to protect and preserve the property of the estate, and to bring all necessary suits for that purpose, and to collect the debts of the estate, and if he is defeated in such actions he is not liable for costs in his individual capacity, but the same are payable out of the assets of the estate, and any judgment for costs must be so rendered. §2446 Burns 1901, §2291 R. S. 1881 and Horner 1901; *Mackey v. Ballou*, 112 Ind. 198.

It will be observed that the Jennings Circuit Court, in the action against appellant for an accounting, rendered judgment for costs against appellee, payable out of the assets of the estate of John F. Bruning, and overruled a motion of appellant to modify the same and render judgment for costs against appellee in his individual capacity. It has been held that such a judgment fixes the liability of the estate, and is not subject to collateral attack. *Chicago, etc., R. Co. v. Harshman*, 21 Ind. App. 23, 27, and cases cited.

It is also settled that when an administrator exercises reasonable care, and in good faith prosecutes and defends cases for the collection of debts and the protection and preservation of the property of the estate, he is entitled to have the costs and reasonable expenses thereof allowed as credits in his settlements, even though he may have failed

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in such actions or defenses. *Mackey v. Ballou*, 112 Ind. 198; Thornton & Blackledge, Adm. and Set. of Estates, §76, p. 191; Henry's Probate Law, §§480, 481; Woerner's Am. Law of Adm. (2d ed.), bottom p. 1149, and note.

In the case last cited, Mackey was appointed administrator of the estate of Bailey, and took possession of his personal estate for the purposes of administering the same. Bailey had devised all of his real estate to his wife for life, with remainder to Peter Morton and his wife Mary, who was the testator's granddaughter. Bailey had also executed a writing by which he conveyed and transferred his personal estate to Peter and Mary Morton, making them the owners and entitled to the possession thereof. Peter and Mary Morton brought suit against Mackey in his individual capacity, for the possession of said personal property and were successful. By the issues in the case the question was raised as to whether or not Bailey was of sound mind at the time he made his will and executed the bill of sale of the personal property to the Mortons, and that issue was determined in the affirmative and the validity of those instruments established. Mortons recovered a judgment for costs against Mackey personally. Mackey as such administrator claimed an allowance against said estate for \$216 costs made and adjudged against him in said action, and the same was allowed by the court. The effect of the allowance was to compel payment of said costs out of the property given by the will to the Mortons, the parties who recovered said property from Mackey. On application, the allowance was set aside, Mackey appealed, and the judgment setting aside the allowance was reversed. This court said, at pages 202, 203: "The statute provides that an administrator shall have full power to maintain any suit in his name as such administrator, for the recovery of possession of any property of the estate, and that he shall not be liable in his individual capacity for any costs in such suit. §2291 R. S. 1881. See, also, *Evans v. Newland*, 34

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Ind. 112; *Cavanaugh v. Toledo, etc., R. Co.*, 49 Ind. 149. The spirit of the act requires, also, that the administrator shall not be held personally liable for costs which may accrue in a defense against claims of others to property which he may have taken possession of as the property of the estate. Clearly the administrator is not bound to abandon property upon every claim made to it by others. It is his duty to protect the property and preserve it for the estate by all proper means, including a proper defense in a litigation; and for the costs in such a defense he ought not to be made personally liable. Of course, it will be expected that, in engaging in or conducting such defense, he will exercise reasonable care and act in good faith. Here, neither want of reasonable care nor bad faith is charged upon the administrator. He took possession of the personal property, as he alleges, believing in good faith that it was property belonging to the estate. Appellee seems to base his case solely upon the grounds that the Mortons prosecuted their action against appellant in his individual, and not in his representative, capacity, and that the costs in the action were adjudged and taxed against him in his individual, and not in his representative, capacity. An administrator has no way of compelling others instituting actions of replevin against him for personal property to institute them against him as administrator. And the fact that in such actions instituted against him in his individual capacity, the costs may be taxed against him personally, would not seem to be a sufficient reason for not allowing them as a claim against the estate by the probate court. Such an allowance, doubtless, may be refused where there is bad faith or culpable negligence in the bringing of, or defending against, actions; but, as we have said, nothing of the sort is sufficiently charged here."

It is evident, under the law declared in said case, that appellee was entitled to credit for said disbursements for costs and expenses and for his own services unless it is

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shown that there was "bad faith or culpable negligence" in bringing said action against appellant.

The law in this State provides for the settlement of decedents' estates by executors and administrators, and the general rule is that actions on behalf of the estate can only be maintained by an executor or administrator. *Jewell v. Gaylor*, 157 Ind. 188, and cases cited; *Jester v. Gustin*, 158 Ind. 287, and cases cited. There are exceptional cases, however, where, on account of fraud or collusion between the executor or administrator and surviving partner, or the executor or administrator is the surviving partner, that the widow, heirs, legatees, or other persons interested may maintain the action. 17 Am. & Eng. Ency. Law, 1277, 1278.

It is true that when an estate is not indebted, and there is no executor, administrator, widow, or other person entitled to control or share in the claims due the estate, the heirs may sue and collect the same, or may maintain an action against a surviving partner of the deceased for an accounting. *Jewell v. Gaylor*, *supra*, and cases cited; *Jester v. Gustin*, *supra*; 17 Am. & Eng. Ency. Law, 1277, 1278. Where, however, heirs attempt to settle an estate, and there is a dispute, we see no reason why an executor or administrator may not be appointed to settle the same. If one is appointed under such circumstances, it is his duty to proceed with the settlement of said estate, and bring all actions and take all the steps necessary for that purpose. If there is any reason why he should not have been appointed, or why the estate should not be administered, it can only be presented by an application to set aside the appointment; but until this is done, and the appointment set aside, it is the duty of the executor or administrator to discharge the duties imposed by law. All costs and expenses incurred in the discharge of these duties, when he exercises reasonable care and acts in good faith, are proper charges against the estate.

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Appellant contends that executors and administrators have no authority to litigate adverse claims of heirs, legatees, devisees, or claimants; that any recovery against him would be for the sole benefit of his sister Clara Copeland; and that neither a general or special administrator has the power to prosecute suits against one heir for the sole benefit of another heir; and the costs and expenses incurred or paid in such suits by the administrator are not a proper charge against the estate,—citing authorities. All that the cases cited by the appellant hold is: (1) That an administrator can not represent either side of a contest between heirs, devisees, or legatees contesting for the distribution of an estate; that he can not litigate the claims of one set against the other. His duty is to preserve the estate and distribute it as the court shall direct. *In re Jessup's Estate*, 80 Cal. 625, 22 Pac. 260; *Roach v. Coffey*, 73 Cal. 281, 14 Pac. 840; *Estate of Marrey*, 65 Cal. 287, 3 Pac. 896; *Estate of Wright*, 49 Cal. 550; *Bates v. Ryberg*, 40 Cal. 463; *In re Dewar's Estate*, 10 Mont. 422, 424, 426, 25 Pac. 1025. (2) A receiver should not advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all, and for that reason should, as far as possible, see to it that each has an equal opportunity to enforce his claim. *American, etc., Bank v. McGettigan*, 152 Ind. 582, 587, 71 Am. St. 345. (3) The successful contestant of a will is not entitled to have the extraordinary expenses of the contest paid out of the estate where the contest was for his benefit alone, the proportions of the other heirs being diminished by the rejection of the will. Where, however, the executor named in the will, in good faith and upon reasonable grounds, has endeavored to probate it, he is entitled to have any extraordinary expenses, such as his attorney's fees and other incidental costs, paid out of the estate, although the will be rejected; but where one, merely as devisee or as a curatrix of the estate of a decedent, attempts to set up a will which is rejected, he is not entitled

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to have the expenses of the litigation paid out of the estate. *Taylor v. Minor*, 90 Ky. 544, 14 S. W. 544. (4) Where one is an executor and also a beneficiary under the will, and employs counsel to uphold the will against a contest in which the will is set aside, it is proper for the court to apportion the counsel fees as between such person in his individual capacity and as executor. *Roll v. Mason*, 9 Ind. App. 651. None of these cases sustains appellant's contention here. They only go to the contests between heirs and legatees and creditors as to the distribution of the funds in the hands of an executor, administrator, or receiver, and to contests of wills.

In such cases it is clear that the custodian of the funds can not take any part in such controversies, or pay out of the funds in his hands any costs of suits by any one of such parties against the other. The estate has no interest in such controversies. Here, however, the claim against appellant, if any, was due the estate of John F. Bruning, and not Clara Copeland. Whatever interest she had therein was as heir or legatee, depending on the probate of the will. The right of action was in the special administrator so long, at least, as the action to contest the will was pending, and not in Clara Copeland. The controversy was not in regard to her interest in the amount of the personal estate of John F. Bruning, deceased, for distribution, but what amount, if any, was due the estate of John F. Bruning, deceased, from appellant, surviving partner, on an accounting and final settlement of the partnership of John F. Bruning & Son. Such claim, if any, was an asset of the estate. In bringing the action, appellee did not take the side of appellant's sister. He took the side of the estate, and brought the action to enforce its rights. It is true, if the special administrator had recovered a judgment in such action, the assets of the estate would have been increased thereby. But while Clara Copeland's interest in the estate would

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have been increased by one-half the amount of such judgment, appellant's interest in the estate would have been increased the same amount. This is true in all cases where there is a controversy as to whether an heir, legatee, or devisee is indebted to the estate, by a promissory note or otherwise. A judgment thereon in favor of the estate may increase the amount for distribution, at the expense of the heir, devisee, or legatee against whom the same is rendered. But his interest in the estate is not necessarily reduced thereby. Such actions may benefit the other heirs, legatees, or devisees, by increasing the amount for distribution, but that is no reason why the fees of the attorney of the administrator or executor in such case should not be paid out of the assets of the estate; and, in case the claim is defeated, the fact that the payment of the attorney's fees and costs out of the estate may diminish the share of the one against whom the action was brought is no reason for not allowing the same as a credit to the executor or administrator bringing the action, in his settlements. The payment by the estate of costs and expenses of such actions, whether gained or lost, is governed by the same rules as in actions against strangers.

It is next insisted that as appellant has recovered in the United States Circuit Court a decree enforcing an equitable lien against all the real estate devised to Clara Copeland by the will of her father for \$8,546.44, money paid by appellant as surety, and for taxes paid by appellant, and for excess of rent received by her since her father's death, which is more than the property devised to her is worth, that, therefore, the effect of an allowance of said contested items is to compel appellant to pay the whole amount thereof, and that the same should not be approved for that reason. If the special administrator is entitled to be paid out of the assets of the estate of John F. Bruning, deceased, the fact that such payment will reduce the amount that can be applied to discharge the decree in favor of appellant against

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Clara Copeland is not material. Heirs and legatees are not entitled to anything until the costs of administration have been paid. Clara Copeland's share of said estate is liable for its proportion of said contested items, and the allowance thereof does not compel appellant to pay the same, but merely reduces the fund or property out of which his decree against Clara Copeland is to be paid.

Whether or not appellee exercised reasonable care and acted in good faith in commencing and prosecuting said action against appellant was a question of fact, which was determined by the trial court in favor of appellee. As there is evidence to sustain such finding, the same is not open to review here.

Judgment affirmed.

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[No. 19,670. Filed October 7, 1902.]

CRIMINAL LAW.—*Affidavit and Information.*—*Physicians.*—An affidavit and information, in the form prescribed by §7323c Burns 1901, charging defendant with unlawfully practicing medicine without first having procured a license so to do, sufficiently states the nature of the accusation, although under the statute various acts may enter into the offense. pp. 213, 214.

PHYSICIANS.—*Practicing Without License.*—*Evidence.*—Evidence that defendant held himself out as a magnetic healer, advertised as such, and styled himself "Professor"; that he was not a graduate of any school of medicine, and had no license; that he treated a patient for a lame ankle which he diagnosed as rheumatism, the treatment consisting in holding the afflicted parts and rubbing them, and received \$1 for the treatment, was sufficient to show defendant guilty of practicing medicine without a license in violation of §§7318-7323e Burns 1901. pp. 214, 215.

CRIMINAL LAW.—*Good and Bad Counts of Indictment.*—*Presumptions on Appeal.*—Where there is one sufficient count in an indictment, and a general verdict of guilty is returned on which judgment is rendered, it will be presumed on appeal that the judgment was rendered on the good count. p. 215.

STATUTES.—*Amendments.*—*Construction.*—Where an act is amended it will be construed as though the amendments as they exist had been incorporated in the original act. pp. 215, 216.

159	211
159	417
159	498
159	211
161	256
161	257
161	346

159	211
164	201
164	209
159	211
167	11
167	224
168	332

159	211
169	222

159	211
171	141
171	443
171	615

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CONSTITUTIONAL LAW.—*Physicians.—Licenses.—Privileges and Immunities.*—The privileges and immunities clause of the fourteenth amendment to the federal Constitution has no application to the denial of the right to practice medicine without first procuring a license as provided by §§7318-7323e Burns 1901. pp. 216, 217.

SAME.—*Police Power.—Statutes.—Discretion of Legislature.*—While laws enacted by a state under its police power must be wholesome and reasonable, a very large measure of authority is vested in the legislative department to determine what is reasonable and wholesome. pp. 217-223.

PHYSICIANS.—*Licenses.—Constitutional Law.—Classification.—Magnetic Healing.*—The law regulating the practice of medicine, §§7318-7323e Burns 1901, is a valid exercise of the police power of the State although it exempts physicians and surgeons legally qualified to practice in the state in which they reside, when in consultation with a legal practitioner of this State; physicians and surgeons residing on the border of a neighboring State, and authorized to practice under the laws thereof, whose practice extends into the limits of this State; opticians; prevents magnetic healers from following their occupations, and permits the granting of licenses to practice osteopathy. pp. 223-229.

CONSTITUTIONAL LAW.—*Statutes.—Title.*—Section 19 of article 4 of the Constitution providing that "every act shall embrace but one subject and matters properly connected therewith" does not require that the title shall be an epitome of the act. It is the subject of the act, and not the matters properly connected therewith that the Constitution requires to be expressed in the title. pp. 229-231.

From Lawrence Circuit Court; *W. H. Martin*, Judge.

George P. Parks was convicted of practicing medicine without a license, and appeals. *Affirmed.*

S. B. Peugh, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

GILLETT, J.—Appellant was prosecuted, by affidavit and information, for practicing medicine without a license. There were three counts in the affidavit and information. Appellant moved to quash each count thereof, but his motion was overruled, and he excepted. Upon issue joined, a trial was had that resulted in a finding of guilty as charged in each count. Judgment was rendered in accordance with the finding. A motion for a new trial, in con-

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nection with a proper assignment of error, presents the further question as to the sufficiency of the evidence. The first count of the affidavit and information was in the form prescribed by statute. Acts 1901, p. 475, §8, §7323c Burns 1901. It is contended, notwithstanding, that the charge is insufficient because of uncertainty.

In *Benham v. State*, 116 Ind. 112, which was a prosecution for a like offense, the charge was in the same general form, and it was held sufficient by this court. It was there said, at page 114: "We are of opinion, however, that the indictment in this case is not open to the objection that it does not state the offense charged with sufficient certainty. The offense charged against appellant herein is purely a statutory offense—that is, it was created and defined and its punishment prescribed by the provisions heretofore quoted of the above entitled act of April 11, 1885. In such a case, it has been held by this court, as a general rule, that an indictment or information will be sufficient to withstand a motion to quash, if it charge the offense in the language of the statute, or in terms substantially equivalent thereto. *Howard v. State*, 87 Ind. 68; *State v. Miller*, 98 Ind. 70; *Ritter v. State*, 111 Ind. 324; *Trout v. State*, 111 Ind. 499. In the case under consideration it is conceded on behalf of appellant that the offense charged is a statutory offense, and that the indictment charges him with such offense substantially in the language of the statute. In *Eastman v. State*, 109 Ind. 279, the appellant was prosecuted, as we may infer from the opinion of the court, as is the defendant in the case in hand, for unlawfully practicing medicine without having first procured, from the proper clerk, a license so to do. In the case cited the sufficiency of the charge seems to have been challenged, and, upon this point, the court there said: 'The offense is charged in the language of the statute, and this is sufficient. *State v. Miller*, 98 Ind. 70, and cases cited; *Graeter v. State*, 105 Ind. 271;

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Antle v. State, 6 Tex. App. 202.'” Various acts may enter into the offense, but the acts, whether many or otherwise, constitute but one substantive offense, created by §1 of the act of 1897 (§7318 Burns 1901), namely, the offense of practicing medicine, surgery, or obstetrics without a license. As was said by this court in *Shilling v. State*, 5 Ind. 443: “Whenever the charge consists of a series of acts, they need not be specially described, because they are not the offense itself, but merely go to make up the evidence of the offense.” It is proper to consider in addition the effect of the provision of the statute as to what shall be a sufficient charge. We cite as authorities bearing upon this question the following cases: *Riggs v. State*, 104 Ind. 261; *State v. Learned*, 47 Me. 426, 433; *State v. Corson*, 59 Me. 137; *Wolf v. State*, 19 Ohio St. 248; *Turpin v. State*, 19 Ohio St. 540; *Cathcart v. Commonwealth*, 37 Pa. St. 108; *Goersen v. Commonwealth*, 99 Pa. St. 388; *State v. Morgan*, 112 Mo. 202, 20 S. W. 456, and cases there cited. As there was no relaxing of the requirement that the ultimate substantive offense should be stated, we think, especially in view of the above authorities, that there has been no denial of the right of appellant to demand the nature and cause of the accusation against him.

It appears from the evidence that at the time in question the appellant practiced magnetic healing, and had done so for eight years prior thereto; that he did not use medicines or surgery; that he held himself out as a magnetic healer, advertised as such, and styled himself “Professor;” that he was not a graduate of any school of medicine, and had no license; that he diagnosed cases entirely by the nerves; that on the 8th day of April, 1901, one Edward Garvey came to him to be treated for a lame ankle; that after examining the ankle appellant diagnosed the case as rheumatism, and proceeded to give treatment, which consisted, at least in so far as there was anything manual about it, in holding the afflicted parts and rubbing them. An

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effort upon the part of appellant, while testifying as a witness, to describe magnetic healing was prefaced by the statement that "it is pretty hard to describe for people to understand." At this point he was interrupted by the court, and the subject does not seem to have been pursued further. Appellant charged and received \$1 for the treatment that he gave said Garvey. There can be no question as to appellant's guilt, if the act under which he was convicted is valid.

Assuming, for the time being, the validity of the statute, we do not think that any question is presented as to the sufficiency of the second and third counts of the affidavit and information. The rule of the criminal law is that when there is a good count and a bad count, and a general verdict of guilty is returned on which judgment is rendered, it will be presumed on appeal that the judgment was rendered on the good count. *Powers v. State*, 87 Ind. 97. It is true that the finding affirmatively appears to have been based on each count, but in a case of this kind, where there is one sufficient count,—assuming the validity of the statute,—and that count is established by evidence of a single, substantive transaction, admitted by the appellant, we think that questions as to the sufficiency of other counts of the affidavit and information are moot questions.

The prosecution in this case is based on the act of March 8, 1897 (Acts 1897, p. 255), and its subsequent amendments. §§7318-7323e Burns 1901. Certain sections of the act of 1897 were amended by an act passed in 1899. Acts 1899, p. 247. By an act passed in 1901, §8 of the original act was amended and certain sections of said amended act of 1897 were in turn amended. Acts 1901, p. 475. The act as it now stands is too long to set out here. It will reasonably suffice to set out that portion of §8 of the act, as amended in 1901, that precedes the provision as to what a charge of violating the act shall contain. Said first portion of the section referred to is as follows: "To open an office for such purpose or to announce to the public in

any way, a readiness to practice medicine in any county of the State, or to prescribe for, or to give surgical assistance to, or to heal, cure or relieve, or to attempt to heal, cure or relieve those suffering from injury or deformity, or disease of mind or body, or to advertise, or to announce to the public in any manner a readiness or ability to heal, cure or relieve those who may be suffering from injury or deformity, or disease of mind or body, shall be to engage in the practice of medicine within the meaning of this act: Provided, that nothing in this act shall be construed to apply to or limit in any manner the manufacture, advertisement or sale of proprietary medicines. It shall also be regarded as practicing medicine within the meaning of this act, if any one shall use in connection with his or her name the words or letters, 'Dr.,' 'Doctor,' 'Professor,' 'M. D.,' or 'Healer,' or any other title, word, letter, or designation intending to imply or designate him or her as a practitioner of medicine or surgery in any of its branches: Provided, that this act shall not be construed to apply to non-itinerant opticians who are at this time engaged in, or who may thereafter engage in the practice of optometry in this State, nor to professional or other nurses."

The act of 1897, as amended in 1899, and as further amended in 1901, must be construed as though the amendments as they now exist had been incorporated in the original statute. *Blakemore v. Dolan*, 50 Ind. 194; *Pomeroy v. Beach*, 149 Ind. 511.

The appellant challenges the validity of the amended statute as applied to him. This challenge is based largely on the claim that the amended statute is in conflict with the fourteenth amendment to the federal Constitution. That amendment is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of

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citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The privileges and immunities clause of this amendment has no application to the denial that is complained of here. *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485; *Cooley's Const. Lim.* (5th ed.), 397.

But the last two clauses of the amendment challenge our attention. These are plain restrictions upon the exercise of arbitrary and capricious power over persons and property, when exercised by the state through any of its agencies. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. This amendment greatly expanded the power of the federal courts over state legislation, and conferred a like power upon the courts of the state, except in instances where like restraints were already embodied in the constitutions of the states. As to the provision concerning due process of law, it was said by the Supreme Court of the United States, in *Holden v. Hardy*, *supra*, at page 389: "This court has never attempted to define with precision the words 'due process of law,' nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense." In *Dent v. West Virginia*, *supra*, at page 124, it was said by Mr. Justice Field, in pronouncing the opinion of the court: "The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affect-

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ing the rights of the citizen. As said by this court in *Yick Wo v. Hopkins*, speaking by Mr. Justice Matthews: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' 118 U. S. 356, 369. See, also, *Pennoyer v. Neff*, 95 U. S. 714, 733; *Davidson v. New Orleans*, 96 U. S. 97, 104, 107; *Hurtado v. California*, 110 U. S. 516; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 519."

The right to contract, as a means of acquiring property, is put on the same footing as the right to property. *Holden v. Hardy*, *supra*; *Dent v. West Virginia*, *supra*. In the case last cited it was said, at page 121: "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and can not be arbitrarily taken from them, any more than their real or personal property can be thus taken."

It was not, however, the effect of the last two clauses of the fourteenth amendment to emasculate the just powers of the states. The authority of the state remains so to control the conduct of individuals by reasonable laws as to protect the welfare of the community. As said by Judge Cooley: "Any accurate statement of the theory upon which the police power rests will render it apparent that a proper

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exercise of it by the state can not come in conflict with the provisions of the Constitution of the United States. If the power extends only to a just regulation of rights, with a view to the due protection and enjoyment of all, and does not deprive any one of that which is justly and properly his own, it is obvious that its possession by the state, and its exercise for the regulation of the property and actions of its citizens, can not well constitute an invasion of national jurisdiction, or afford a basis for an appeal to the protection of the national authorities." Cooley's Const. Lim. (8th ed.), 707. See, also, *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Minneapolis, etc., R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

The most extensive and pervading power existing in the states, by virtue of their general sovereignty, is the police power. "By the public police and economy," said Sir William Blackstone, in his commentaries on the laws of England, "I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Blackstone's Com. (Wend.), 162. "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L. Ed. 394. There are doubtless some rights of a purely personal and private character that their possessor does not surrender to the whole people by becoming a member of organized society. *Munn v. Illinois*, 94 U. S. 113, 124, 24 L. Ed. 77. But it

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is evident that he must concede to society, in return for the enjoyment of its privileges, a large measure of authority over his conduct and possessions, and that in the process of development from a rude state of society to a complex civilization the zone of personal and private rights that are beyond legislative control must constantly diminish. *Holden v. Hardy, supra*. The maxim, *sic utere tuo ut alienum non laedas*: so use your own that another you may not injure, is the source of the police power, and furnishes the implied condition upon which every member of society possesses and enjoys his property. *Munn v. Illinois, supra*; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 566, 19 Sup. Ct. 281, 43 L. Ed. 552.

Under the law of eminent domain, the owner of property is entitled to compensation when his property is actually taken, and while the distinction between the exercise of this power and that of the police power may sometimes be difficult to perceive in practice, yet in their leading theories they are broadly differentiated, by reason of the fact that if the imposition of the burden or the control of the privilege can be affirmed as an act done within the scope of the police power, under existing laws, then there is no right of compensation. To that extent must the individual right be subordinated to the public weal. Under this power various burdens are imposed: Criminals are deprived of their liberty; the implements of crime are destroyed; vice and pauperism are controlled; noxious trades are regulated; nuisances are suppressed; children are required to attend school; the property of infants and persons *non compos* is placed in the control of others; the construction of buildings in populous neighborhoods is regulated; provision is made for the greater safety of passengers upon railways and steamboats; employers are required to provide safe places in which the work of their employes is to be performed; the hours of work, in employments deleterious to the health, limited; the employment of children in factories

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prohibited; pure food laws are enacted; physicians, dentists, and druggists are licensed; and so the list might be almost indefinitely expanded by specific instances of authorized legislative regulations, enforcing the social compact, for the protection of life, health, morals, property, and the general weal of the community, until we perceive that definition is impossible and that the whole matter of the legislative element of sovereignty, as opposed to individual liberty, must, in the absence of other constitutional restriction, be left, as the federal Supreme Court has declared, to the gradual processes of judicial inclusion and exclusion, as the cases presented for decision require. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

For hundreds of years the matter of the conservation of the public health has been a leading matter of police control. If a man holds himself out to the community as a person skilled in the science of healing and on that ground seeks the opportunity to exercise the skill he claims to possess, his business becomes impressed with a public character, and he is therefore subject to reasonable regulation in its prosecution.

This court upheld the medical law as it stood in the year 1897, in *State, ex rel., v. Webster*, 150 Ind. 607, 41 L. R. A. 212, and the authority of a state, in the exercise of its police power, to pass a reasonable law upon that subject was affirmed by the United States Supreme Court in *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623. Upon the authority of these cases, and the many cases decided by the courts of other states, and cited in the case of *State, ex rel., v. Webster, supra*, we might perhaps without discussion have decided most of the questions involved in this case, but as the statutes upon which the judgments in those cases rest are different from the statute here under consideration, and as the appellant assails said act as an unwarranted invasion of his pursuit of a business

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that he claims is at least harmless, it has seemed to us proper to consider, to some extent, the authority of the state to control him in the exercise of such pursuit.

In *Dent v. West Virginia, supra*, at page 122, it was said: "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications."

Counsel for appellant denounce the law in question as "an attempt to determine a question of science, and control the personal conduct of the citizen without regard to his opinion, and in a matter in which the public is in no wise concerned." We think, on the contrary, that the matter is one of very considerable concern, and that the legislature is the appropriate tribunal to determine the degree of learning that those who gain a livelihood by seeking to relieve the bodily ailments of others should possess. While it is true that the often quoted definition of police power afforded by Chief Justice Shaw, in *Commonwealth v. Alger*, 7 Cush. 53, 85, contains the limitation that such laws must be wholesome and reasonable, yet it is evident, as the power to enact laws has been confided to the legislative department, that a very large measure of authority is vested in that department to determine what is reasonable and wholesome in the enactment of statutes under the police power.

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The courts could never venture to run a race of opinion with the legislature upon questions of mere expediency; such a course would be a gross judicial usurpation of power.

Appellant's counsel particularly objects to the classification that the statute provides for, on the ground that it is unjust and arbitrary. In the exercise of the police power there must needs be a considerable discretion vested in the legislature, whereby some people have rights or suffer burdens that others do not. Nevertheless, if the objection mentioned has any real basis, the statute must be condemned by the courts. As said in *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 28 L. Ed. 923: "The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

The statute of a state that deprives any person of his life, liberty, or property without due process of law, or that denies to any person within the jurisdiction of the state the equal protection of the laws, can not be upheld on the theory

that it is an exercise of the power of classification. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. It is undoubtedly true, as stated by Judge Cooley, that a proper exercise of the police power can not come in conflict with the national jurisdiction, but, after all, the ultimate test of propriety must be found in the limitations of the fourteenth amendment, since it operates to hedge in the field of the police power to the extent of preventing the enforcement of statutes in denial of the rights that the amendment protects. Especially in cases where statutes are enacted that deny to persons the right to follow their accustomed vocations in life, while the same right is granted to others, are the courts insistent that there must be some substantial basis in reason and justice for the discrimination. The Connolly case above cited is the latest expression of the United States Supreme Court upon this general subject. In that case what is popularly termed an anti-trust act, denying to offending corporations the right to enforce their contracts by suit, was condemned because of a section thereof that provided that the provisions of the act should not apply to agricultural products or live stock while in the hands of the producer or raiser. In disposing of the question the court, at page 563, said: "It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce."

Of course the point decided in the above case is only illustrative of the proposition that enactments within the domain of the police power may be obnoxious to the federal Constitution by reason of an arbitrary exercise of the power

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of classification. The power of reasonable classification, however, exists (*Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Hayes v. Missouri*, 120 U. S. 68, 71, 7 Sup. Ct. 350, 30 L. Ed. 578), and in cases where there is room for the presumption that a substantial and just reason furnished the basis for legislation enacted in the carrying out of a public purpose, the exercise of the legislative discretion, in the establishing of a classification, must be respected by the courts. *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780.

We do not think that there is involved in this case a question as to the authority of the legislature to discriminate against a particular school of practitioners. 'We are not judicially advised that magnetic healing, so called, is so far based on coördinated, arranged, and systematized knowledge that it can be termed a science, or that any considerable degree of instruction is a prerequisite to its prosecution, as it is actually practiced by those whose knowledge does not go beyond the manifestation of the phenomena of magnetism. It may have been the judgment of the legislature, in its implied exclusion of appellant, that both the limitations of value that the treatment possessed and the dangers attending it made it wise to confine its use to a body of men in whose hands it would be safer to entrust it, because of their education in subjects relevant to its administration.

The legislature, in judging of a matter of this kind, was authorized to give heed to the opinions of scientific men, and, presuming that it did so, it doubtless found substantial reason for the act of exclusion complained of. Judged by such authority, it appears that while the practice of magnetic healing is based on some elements of ascertained knowledge, yet that its prosecution is attended with danger to such a degree that the legislature was justified in its effort to take it out of the hands of empirics. Thus, J. G.

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M'Kendrick, professor of the institutes of medicine, University of Glasgow, in concluding his learned article on Animal Magnetism, in the *Encyclopaedia Britannica*, says: "It is evident then that animal magnetism or hypnotism is a peculiar physiological condition excited by perverted action of certain parts of the cerebral nervous organs, and that it is not caused by any occult force emanating from the operator. Whilst all the phenomena can not be accounted for, owing to the imperfect knowledge we possess of the functions of the brain and cord, enough has been stated to show that just in proportion as our knowledge has increased has it been possible to give a rational explanation of the phenomena. It is also clear that the perverted condition of the nervous apparatus in hypnotism is of a serious character, and therefore that these experiments should not be performed by ignorant empirics for the sake of gain, or with a view of causing amusement. Nervous persons may be seriously injured by being subjected to such experiments, more especially if they undergo them repeatedly; and it should be illegal to have public exhibitions of the kind alluded to. The medical profession has always been rightly jealous of the employment of hypnotism in the treatment of disease, both from fear of the effects of such operations on the nervous systems of excitable people, and because such practice is in the border land of quackery and of imposture. Still, in the hands of skilful men, there is no reason why the proper employment of a method influencing the nervous system so powerfully as hypnotism should not be the means of relieving pain or of remedying disease."

As appellant was without the license provided for by statute, it may be presumed that he was engaged in empiricism, which is defined as a practice of medicine,—using that term in its popular sense,—founded on mere experience, without the aid of science or a knowledge of its principles. The State has by no means denied the right to seek to relieve persons afflicted with rheumatism by the process of manipu-

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lating and kneading the diseased or affected parts, with or without the element of hypnotic suggestion, but the legislature has sought to deny to all persons the right to do the acts denominated by statute as "engaging in the practice of medicine" unless they possess the certificate required.

The statute in question, in its general scope, goes no further than to establish a standard that may be attained by reasonable application, and the means has an appropriate relation to the end. There is plainly, as applied to the case in hand, no arbitrary or unreasonable deprivation of right. In the language of the court in *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623: "The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

We will now proceed to consider the elements in the legislative scheme of classification of which complaint is particularly made. The amendment of 1899 provides that the law shall not apply "to any physician or surgeon who is legally qualified to practice in the state or territory in which he resides, when in actual consultation with a legal practitioner of this State, nor to any physician or surgeon residing on the border of a neighboring state and duly authorized to practice under the laws thereof, whose practice extends into the limits of this State. Provided, that such practitioner shall not open an office or appoint a place to meet patients or receive calls within the limits of this State." The people of the State ought not to be deprived of the opportunity to call in consultation with their own physicians and surgeons eminent and skilful physicians

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and surgeons of other states, and considerations of convenience to the people doubtless prompted the establishing of the exception to the operation of the law in the case of physicians and surgeons residing on the borders of the State. Even the members of this class must be authorized to practice under the laws of the states in which they respectively live, where it may be fairly presumed that there are reasonable restrictions. Like provisions have been upheld by other courts. *France v. State*, 57 Ohio St. 1, 11, 47 N. E. 1041; *State v. Van Doran*, 109 N. C. 864, 14 S. E. 32; *Fox v. Territory*, 2 Wash. Ter. 297, 5 Pac. 603; *Commonwealth v. Wilson*, 19 Pa. Co. Ct. 521; *Commonwealth v. Finn*, 11 Pa. Super. 620; *Scholle v. State*, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411.

The lines of employment of the optician and that appellant was pursuing are so diverse as to raise no question as to the power of the legislature to discriminate between them. There is, in this instance, wanting the "like circumstances" necessary to raise any question of arbitrary discrimination. *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578.

The exception in favor of professional and other nurses might present a question of difficulty if appellant were only charged with an act that might be properly described as nursing, but he is impliedly charged under the first count with a violation of the statute in other particulars,—particularly in the manner in which he held himself out. As said by the supreme court of Illinois in *People v. Gordon*, 194 Ill. 560, 571, 62 N. E. 858: "We all agree that the objects and purposes of this and similar statutes are to protect the sick and suffering, and the community at large, against the ignorant and unlearned who hold themselves out as being possessed of peculiar skill in the treatment of disease; from holding themselves out to the world as phy-

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sicians and surgeons without having acquired any knowledge whatever of the human system or the diseases and ailments to which it is subject. Without some knowledge of the location and offices of the various nerves, muscles, and joints, the manipulation of those parts and the flexing of the limbs can not be intelligently, if, indeed, safely, practised. Merely giving massage treatment or bathing a patient is very different from advertising one's business or calling to be that of a doctor or physician, and, as such, administering osteopathic treatment. The one properly falls within the profession of a trained nurse, while the other does not."

Appellant's counsel further objects to a classification that excludes appellant from following his business, while it permits the granting of licenses to practice osteopathy. Osteopathy is defined by the Annual Encyclopaedia for 1900, page 554, as "A method of treating diseases of the human body without the use of drugs, by means of manipulations applied to various nerve centers, chiefly those along the spine, with a view to inducing free circulation of the blood and lymph, and an equal distribution of the nerve forces. Special attention is given to the readjustment of any bones, muscles, or ligaments not in the normal position." The encyclopaedia names some seven osteopathic colleges, and states that the prescribed course of study covers a period of four terms, of five months each, and that the curriculum includes, in addition to the theory of clinical demonstration of osteopathy, demonstrative and descriptive anatomy, histology, chemistry, physiology, hygiene, pathology, physiological psychology, dietetics, obstetrics, and minor surgery. The classification under consideration seems to be based on mental competency, and is far from arbitrary. We think, therefore, that this objection is without merit.

Appellant's counsel further contends that the section of the statute of 1901 that we have quoted is invalid for the want of a sufficient title. Section 19 of article 4 of the

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Indiana Constitution ordains that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title." As the acts of 1899 and 1901 both purport to be amendatory of the act of 1897, it is proper to determine the question raised by considering whether if §8 had been a part of the original act it would have been sufficiently entitled. The title of the last mentioned act reads as follows: "An act regulating the practice of medicine, surgery and obstetrics, providing for the issuance of a license to practice, providing for the appointment of a state board of medical registration and examination and defining their duties, defining certain misdemeanors and providing penalties, and repealing all laws in conflict therewith and certain acts therein specified."

It is not required that the title to an act should be an epitome of the act. It is the "subject" of the act, and not the "matters properly connected therewith," that the Constitution requires to be "expressed in the title." As stated by Fraser, J., in *Hingle v. State*, 24 Ind. 28, 32: "The mischiefs intended to be prevented by the section were two: First, the passage of any act under a false and delusive title, which did not indicate the subject-matter contained in the act,—a trick by which members of the legislature had been deceived into the support of measures in ignorance of their true character. Second, the combining together in one act of two or more subjects, having no relation to each other,—a method by which members, in order to procure such legislation as they wished, were often constrained to support and pass other measures obnoxious to them, and possessing no intrinsic merit." The subject of the act in question may be said to be a regulation of the practice of medicine, surgery, and obstetrics. Is this subject sufficiently definite to authorize the enactment in question? It seems to us that the matters mentioned in said amendatory section are, at least, for the most part, matters properly connected with the subject stated. It was certainly competent for the legis-

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lature to submit in connection therewith a fairly relevant definition of the "practice of medicine." We are not called upon to determine whether all of the acts mentioned in said section can properly be denominated as practicing medicine.

It is only necessary to determine whether the appellant has brought himself within the statutory definition of the practice of medicine, in so far as the acts therein mentioned can be said, in a substantial sense, to amount to practicing medicine. The term "practice of medicine" is, at least in its popular sense, generic in its character. *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923; *People v. Gordon*, 194 Ill. 560, 62 N. E. 858; *Little v. State*, 60 Neb. 749, 753, 84 N. W. 248, 51 L. R. A. 717; *State, ex rel., v. Lee* (La. Sup.), 31 South. 14. This court has announced that it is its disposition, in the enforcement of the constitutional mandate under consideration, not to embarrass the legislature by unnecessary strictness in the enforcement of the requirement. *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, and cases there cited. In the case of *In re Campbell*, 197 Pa. St. 581, 588, 47 Atl. 860, it was said: "The purpose of the act is indicated in the phrase 'to regulate the practice of medicine and surgery.' This gives notice to any one desiring to enter the practice, that its provisions do or may concern him. Nothing more is required."

It is our conclusion that appellant was engaged in the practice of medicine, since he held himself out as a magnetic healer, and his method of treatment was, at least in part, the method that medical practitioners sometimes employ.

If it was competent for the legislature to have enacted the amendment of 1901 as a part of the act of 1897, it is immaterial whether the acts on which appellant's conviction was based were or were not a violation of law in the interim. As the act of 1901 is now a part of the law of 1897, it follows that appellant was properly convicted.

We find no available error. The judgment is affirmed.

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PLACE v. BAUGHER.

[No. 19,871. Filed October 7, 1902.]

EVIDENCE.—*Books of Account.*—*Res Gestæ.*—As sawlogs were delivered to the purchaser at his sawmill, the measurements of such purchaser were entered upon a piece of smooth plank, and on the same day transcribed and entered upon his general books of account. *Held*, that the entries in the books were a part of the transaction of the delivery and measurement of the logs, and were admissible in evidence to show the number of feet of sound timber.

From St. Joseph Circuit Court; *W. A. Funk*, Judge.

Action by Ira F. Place, against John W. Baugher. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

Andrew Anderson, James DuShane and W. G. Crabill, for appellant.

B. F. Shively, H. R. Wair and F. J. L. Meyer, for appellee.

JORDAN, J.—This action was originally instituted against appellee by appellant in the court of a justice of the peace to recover \$152.25, a balance alleged to be due and unpaid on a claim for 43,294 feet of logs sold and delivered by appellant to appellee at the agreed price of \$10 per thousand feet. Appellee claimed that the logs received by him according to measurements contained only 27,126 feet of sound timber, and that by mistake he had paid appellant more than was actually due him for the logs, the excess as claimed by him amounting to \$20.23, for which amount, under his pleading, he demanded judgment. A trial in the justice's court resulted in a judgment against appellant in favor of appellee for \$20.23, from which judgment the former appealed to the circuit court, wherein appellee was awarded a judgment for a like amount, from which appellant appealed to the Appellate Court before the taking

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effect of the act of March 12, 1901. By virtue of an act of the General Assembly approved March 13, 1901, the appeal was transferred to this court.

The real question involved is in respect to the number of feet of sound timber received by appellee from appellant. It is insisted by the latter that a new trial ought to have been granted for two reasons: (1) Because the court erred in allowing appellee to introduce his book of accounts in evidence; and (2) in permitting him to introduce evidence in relation to a general custom or usage which it is claimed existed in the county of St. Joseph and in the northern portion of the State of Indiana, to the effect that in the sale of logs to a millman the measurements made by the latter are taken and considered in a settlement made between the seller and the purchaser as the basis of settlement.

It appears from the evidence that appellee operated a sawmill at the town of Walkerton, in St. Joseph county, Indiana, and the logs in dispute were purchased by him of appellant in the years of 1896 and 1897,—some four years and over before the trial in the lower court. Appellee was a witness in his own behalf and testified to the delivery of the logs at his sawmill by men in the employ of appellant. The principal part of the logs were measured by appellee at his mill-yard as they were delivered, and the number of feet of sound timber contained in each log, according to his measurement and scaling, was inscribed at the time on a piece of smooth plank, and at the close of each day's transaction he would transfer and enter these measurements in a daybook or journal of accounts, and afterwards would transfer and enter them in his general ledger. A number of the logs it appears were measured by one McDaniel, who was assisting appellee in operating the sawmill, and these measurements on the same day they were made were also entered by appellee and McDaniel in the daybook. McDaniel testified that the measurements made by him were correct. Appellee testified that he remembered of the logs being deliv-

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ered at his mill by the employes of appellant, and that he and McDaniel made the measurements as stated, and that his books exhibited the total and correct number of feet of sound timber delivered at his mill by appellant; but he further testified that he could not state from memory alone the result of his measurements, without referring to his book of accounts in which he had entered the measurements as heretofore stated. Over the objections and exceptions of appellant the court permitted him, as a part of his evidence, to read the entries in question from his daybook or journal of accounts. It is contended by counsel for appellant that this, in effect, was the introduction or admission of appellee's books in evidence in his own favor, and therefore the court, in so ruling, erred.

The law in this State relative to the admission in evidence of a party's account-books in his favor is somewhat unsettled; the decision in each case seemingly is controlled by the particular circumstances. In *DeCamp v. Vandagriff*, 4 Blackf. 272, which was an action of assumpsit, it was held that the plaintiff's book of accounts, in which he had charged the items for which he sued, were not admissible to support his demand, for the reason that the admission of the books, under the circumstances in that case, would be violative of the common law of England as adopted in this State.

In *Pittsburgh, etc., R. Co. v. Noel*, 77 Ind. 110, which was an action to recover against a railroad company for the burning of a rick of wood, this court held that the trial court properly ruled in refusing to allow the defendant to put in evidence certain entries made in its own books. Woods, J., speaking for the court, said: "They were not *res gestae* nor public records. They were private entries in the private books of the company made by its agents in the course of their business, but not on that account admissible as evidence, however useful they may or might have been as memoranda, to be used in refreshing the memory of the

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witness who made them." But books or journals of accounts have been held admissible where the entries therein constituted a part of the *res gestae*. *Glover v. Hunter*, 28 Ind. 185; *Fleming v. Yost*, 137 Ind. 95.

The books of a bank kept in the usual course of business have been held admissible for the purpose of showing the state of the depositors' accounts. *Culver v. Marks*, 122 Ind. 554, 7 L. R. A. 489, 17 Am. St. 377. See, also, *Johnson v. Culver*, 116 Ind. 278.

But the point, as here presented, does not involve the mere naked question of the introduction of appellee's day-book. As disclosed by the facts, he testified that the logs were delivered at his mill; that he measured the principal portion thereof, and as a part of the transaction or matter of measuring them he would enter in writing upon a board used for that purpose the number of feet of sound timber contained in each log as ascertained by his measurement and scaling. These measurements, so temporarily made, were on the same day transferred to and entered by him in his regular daybook or journal of accounts. He stated that the entries in respect to the number of feet and the dates on which the logs were received at his mill as entered in his book were correct. As disclosed, several years had passed since the transaction, and without reference to his books he was unable, as he testified, to give from memory alone the number of feet contained in each log which he had measured. Under these circumstances the trial court permitted him to refer to his book, and from an examination thereof to state or read therefrom as a part of his own evidence the number of feet of timber as therein entered and received by him from appellant. In so ruling under the circumstances the court did not err. The witness, as shown, made the entries himself. They were the *res gestae*,—a part of the transaction of the delivery and measurement of the logs,—and the admission of the evidence under the circum-

stances was not that which was merely exhibited by the books wholly unexplained.

We do not consider the second alleged error relative to the admission of evidence to prove the custom or usage in controversy, and therefore the question whether such custom is unreasonable, as claimed by appellant, is not determined, for the reason that there is evidence fully showing that it was agreed to and understood by appellant that appellee was to do the measuring and scaling of the logs at his mill. There is also evidence disclosing that appellee would sometimes measure the logs in the presence of appellant's employes who hauled and delivered them to the mill-yard, one of these being appellant's own son. The latter would sometimes, as testified to by appellee, dispute with him in regard to the number of feet of sound timber in some of the logs as shown by appellee's measurements and scaling, and thereupon appellee would state to him that if he did not want to accept his measurements he need not leave the log at the mill; but in each instance the log was left at the mill. Appellant on the trial was permitted to introduce evidence to support so far as he could what he claimed was the number of feet of sound timber delivered by him to appellee. The lower court, it appears, regarded the evidence which appellee gave as a witness in his own favor in respect to the actual number of feet of sound timber contained in each log delivered at his mill as the most satisfactory and reliable, and rendered its judgment accordingly. If the evidence in regard to the question of custom be rejected there still, in our opinion, remains ample undisputed evidence to justify the finding of the trial court; hence, under the circumstances, if it were conceded that the court erred in admitting the evidence in respect to the custom or usage in dispute, such error would be harmless.

We conclude that the judgment should be, and is, therefore, affirmed.

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CHICAGO AND SOUTH EASTERN RAILWAY COMPANY v. STATE, EX REL. CITY OF NOBLESVILLE.

[No. 19,891. Filed October 7, 1902.]

RAILROADS.—*Conformity of Grade to Street Crossing.*—*Mandamus.*—To afford security for life and property at a railroad and street crossing, a city may, by mandamus, compel a railroad company to lower the grade of its roadbed so as to conform to the grade of the street. pp. 237-241.

TRIAL.—*Special Finding.*—*Motion to Modify.*—A motion to modify special findings is not recognized by the code of procedure in this State, and such motion is properly overruled. p. 241.

SAME.—*Conclusions of Law.*—*Exceptions.*—To save any question for review by an exception to a conclusion of law, the same must be taken when the conclusions of law are filed. p. 241.

SAME.—*Conclusions of Law.*—*Judgment.*—*Modification by Motion.*—The correctness of the conclusions of law can not be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. p. 241.

From Tipton Circuit Court; *W. W. Mount*, Judge.

Mandamus by State on the relation of the city of Noblesville against the Chicago and South Eastern Railway Company. From a judgment for plaintiff, defendant appeals. *Affirmed.*

W. R. Crawford, *U. C. Stover* and *W. H. Najdowski*, for appellant.

I. W. Christian and *W. S. Christian*, for appellee.

MONKS, J.—The relator brought this action to compel appellant, by writ of mandamus, to lower its tracks so as to conform to the grade of the streets crossing the same. The cause was tried by the court, a special finding of facts made, conclusions of law stated thereon in favor of appellee, and a peremptory writ ordered requiring appellant to lower its tracks to conform to the grade of said streets.

The errors assigned and not waived are: "(1) The court erred in overruling appellant's demurrer to the alternative

159	237
159	521

159	237
162	548

159	237
163	41
163	473

159	237
166	224
168	423
168	424

159	237
1170	324

159	237
1171	524

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writ. (2) The court erred in overruling appellant's motion to amend the special findings. (3) The court erred in its conclusions of law. (5) The court erred in overruling appellant's motion to change and modify the judgment."

It is alleged in the alternative writ that appellant's line of railway passes through the city of Noblesville on and along Vine street of said city, which extends east and west through said city and intersects Ninth, Tenth, and Eleventh streets, which last named streets run north and south through said city; that each of said streets, before the construction of said railway, and since, and now are public streets of said city, in constant use by the inhabitants of said city, and the public generally, for travel; that said streets running north and south are the principal streets of said city running north and south, and are now improved as hereinafter stated, and are necessary to said city and the public generally, and that the same are constantly traveled by persons on foot, by vehicles, and loaded wagons drawn by horses, and that said streets are intersected by said line of railway at right angles; and that in traveling upon each of said streets the traveler is compelled to cross over said railroad coming or going from the public square, the business portion of said city, to and from the south part of the city, and that on each day hundreds of persons, and loaded wagons and vehicles drawn by horses, have to cross said railroad at the intersections of said streets; that said Ninth street has been graded and improved, both the roadway and the walks, the roadway being paved with brick and the walks with cement, north and south of said line of railway; and said Tenth street has been graded and improved with gravel and with brick walks north and south of said railway,—each of which improvements were made at thousands of dollars costs to said city and the property owners abutting thereon; and that said defendant company and its predecessors have constructed and is now operating its said line of railroad upon and along

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said Vine street, and has laid and maintained its main track of railroad upon and along said street, and has constructed and now maintains side-tracks and switches on and along said Vine street; and that said defendant or its predecessors in the original construction of said main track and said side-tracks and switches elevated its said tracks by grading up the surface of said street, thereby producing an obstruction to the free use of said street, and especially at the intersections of the said streets hereinbefore mentioned which run north and south through said city; and that by the improvements made on said streets aforesaid said elevation of said tracks of said defendant company became still higher, so that now, and ever since said railroad was constructed, said elevation or grade of said defendant's roadbed and tracks thereon have been a continuous obstruction to the free use of Ninth, Tenth, and Eleventh streets at the points of intersection of said railway on said Vine street, and has and does now render the use thereof dangerous to travelers, and subjects said city to constant danger of suits for damages for any accident that may happen to said travelers in crossing said railroad; and that said city would have no recourse on said defendant company in the event it was mulcted in damages on the account that said defendant company has no property subject to execution, and is wholly insolvent.

And said relator further says that it was and now is the duty of said defendant company to level and cut down its said roadbed and said elevation of its tracks so as to correspond with the surface of said Ninth, Tenth, and Eleventh streets at the points of intersection and where the same cross said railway, and to lower its tracks on its main line and side-tracks and switches at said places so that the top of the rail will be on a level with the surface of said crossings as the said streets are now improved; and that the said relator has frequently notified and requested said defendant company to lower its said roadbed and said tracks so as to

Chicago, etc., R. Co. v. State, ex rel.

be on a level with the surface of said streets as now improved, but that said defendant company has wholly failed and refused to comply with said request and notice and to perform its said duty in reference to said crossings.

In this State a railroad company is authorized to construct its road across a highway only on condition that it restore the highway "to its former state," or place it in such condition "as not to unnecessarily impair its usefulness," and that it construct its road across said highway "so as not to interfere with the free use of the same," and "in such manner as to afford security for life and property." Subdivision 5 of §5153 Burns 1901, §3903 R. S. 1881 and Horner 1901, in force since May 6, 1853; *Chicago, etc., R. Co. v. State*, 158 Ind. 189, and cases cited; Elliott, Roads and Sts. (2d ed.), §§778-780; Elliott, Railroads, §§1102, 1105-1112.

The duty is imposed by statute, and it has been held that it exists independent of the statute. *Evansville, etc., R. Co. v. Crist*, 116 Ind. 446, 454, 2 L. R. A. 450, 9 Am. St. 865; *Evansville, etc., R. Co. v. State, ex rel.*, 149 Ind. 276, 278, and cases cited; *Chicago, etc., R. Co. v. State, supra*; Elliott, Railroads, §§1102, 1105.

In 1895 the General Assembly passed an act which provided: "That it shall be the duty of each railroad company whose road or tracks cross, or shall hereafter cross, any street, avenue or alley in any incorporated town or city in the State of Indiana; which said street, avenue or alley has been, or shall hereafter be by addition, plat or otherwise, dedicated to the public use, to properly grade and plank or gravel its said road and tracks at its intersection with and crossing of said street, avenue or alley in accordance with the grade of said street or avenue, in such manner as to afford security for life and property at said intersection and crossing." Acts 1895, p. 233, §1, §5172a Burns 1901.

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It is said in Elliott, Roads and Sts., §778, of the power of the legislature: "It may regulate the use of highways by a railroad company by requiring the crossings to be made in a particular manner; and may even impose upon the company the duty of adapting the track and grade to new highways so as to make the crossings safe and convenient."

Under the law as declared by this court in *Chicago, etc., R. Co. v. State*, *supra*, and the other cases cited, the facts alleged in the alternative writ were clearly sufficient to withstand appellant's demurrer.

Appellee insists that no questions are presented by the second, third, and fifth errors assigned. It has been uniformly held by this court that motions to modify, strike out, or add to the special findings are not recognized by our code of procedure. Where any or all of the facts found are not sustained by the evidence, or are contrary to law, or where facts should have been found but were not, the proper remedy is a motion for a new trial. *Allen v. Hollingshead*, 155 Ind. 178, 180; *Jones v. Mayne*, 154 Ind. 400; *Smith v. Barber*, 153 Ind. 322; *Windfall, etc., Gas Co. v. Terwilliger*, 152 Ind. 364; *Banner Cigar Co. v. Kamm, etc., Brewing Co.*, 145 Ind. 266, 268, 269; *Tewksbury v. Howard*, 138 Ind. 103; *Bunch v. Hart*, 138 Ind. 1; *Sharp v. Malia*, 124 Ind. 407, 409.

The special findings and conclusions of law stated thereon were announced and filed on December 15, 1900. No exceptions to the conclusions of law were taken on that day. Afterwards, on December 21, 1900, appellant filed a motion to amend the special findings as set forth in said motion, which motion was overruled by the court, after which appellant excepted to each conclusion of law. It is settled that to save any question for review by an exception to a conclusion of law the same must be taken when the conclusions of law are filed. *Medical College v. Commingore*, 140 Ind. 296, 298, and cases cited; *Radabaugh v. Silvers*,

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135 Ind. 605; *Hull v. Louth*, 109 Ind. 315, 333, 58 Am. Rep. 405, and cases cited; *Barner v. Bayless*, 134 Ind. 600, 605, 606; *Winstandley v. Breyfogle*, 148 Ind. 618, *Midland R. Co. v. Dickason*, 130 Ind. 164, 166, and cases cited; *Roeder v. Keller*, 135 Ind. 692, 696; *Elliotts' App. Proc.*, §793; *Ewbank's Manual*, §24.

The judgment rendered in this case was in conformity with the conclusions of law, and if appellant's motion to modify the judgment had been sustained the judgment would not have conformed to the conclusions of law. The motion to modify the judgment was therefore properly overruled, even if the conclusions of law were erroneous. The remedy in such case is an exception to each of such conclusions of law, and assigning the same as error on appeal. The correctness of conclusions of law can not be questioned by a motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. *Nelson v. Cottingham*, 152 Ind. 135, and cases cited; *Allen v. Hollingshead*, 155 Ind. 178; *Maynard v. Waidlich*, 156 Ind. 562, and cases cited; *Jones v. Mayne*, 154 Ind. 400; *Anglemyer v. Board, etc.*, 153 Ind. 217.

Judgment affirmed.

DAVIS ET AL. v. CHASE ET AL.

[No. 19,838. Filed May 27, 1902. Mandate modified October 7, 1902.]

159 242
163 188

ATTORNEY AND CLIENT.—*Contract of Employment.*—*Validity.*—*Public Policy.*—A contract between an attorney and client, by the terms of which the attorney agrees to prosecute a suit for a certain per cent. of the amount recovered, and that the client shall not enter into any compromise of the claim unless the attorney "is present and directs the settlement," is void as against public policy. pp. 243-246.

PLEADING.—*Contract.*—Under a paragraph of complaint counting on a special contract there can be no recovery on an implied contract. p. 246.

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PLEADING.—Cross-Complaint.—Collusion.—Abatement.—In a suit by a creditor to set aside a conveyance as fraudulent, the complaint alleged that certain third persons named were made parties to answer to any interest they might have. To a cross-complaint filed by such third persons the principal defendants filed a plea in abatement to the jurisdiction of the court alleging that at the date of the commencement of the cross-action they were residents of another county, and that by collusion between the original plaintiff and the cross-complainants the latter had been made parties to the action for the purpose of enabling them to file the cross-complaint. *Held*, that the averment of "collusion" did not exclude the idea that the cross-complainants were necessary or proper parties to the original action, and that a demurrer to the plea in abatement was properly overruled. *pp.* 246, 247.

FRAUDULENT CONVEYANCE.—Complaint.—A complaint to set aside a deed as fraudulent which contains no averment as to the financial condition of defendant at the time of the commencement of the action, except that he had no property subject to execution "of which plaintiff has any knowledge," is insufficient. *p.* 247.

From White Circuit Court; *T. F. Palmer*, Judge.

Action by George P. Chase against John D. Davis and others. From a judgment for plaintiff against John D. and Elizabeth Davis, and also in favor of William and Joseph Kreider on a cross-complaint against the defendants, Davis, the latter appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed in part and reversed in part.*

D. C. Justice, E. B. Sellers and *Edward Uhl*, for appellants.

C. E. Spencer and *M. A. Ryan*, for appellees.

GILLET, J.—The appellee Chase filed in the court below his complaint in three paragraphs, founded upon a written contract executed by himself and the appellant John D. Davis; and he also sought by said action to subject to the payment of his demand a tract of real estate that it was alleged that said John had fraudulently caused to be conveyed to his wife, the appellant Elizabeth Davis. Said first mentioned contract is of the following tenor: "This agreement, made and entered into the day and year last

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written, by and between John D. Davis, party of the first part, and George P. Chase, party of the second part, witnesseth: Whereas, John D. Davis has this day employed George P. Chase, party of the second part, to institute and prosecute a suit or cause of action for the purpose of obtaining his share of his father John Davis' estate, and the said John D. Davis hereby authorizes and empowers the said George P. Chase to recover said claim, either by suit or compromise, but that said George P. Chase shall not accept any compromise or settlement unless the same is satisfactory to the said John D. Davis: Now, therefore, in consideration of the said George P. Chase performing said services, the said John D. Davis agrees to pay to the said George P. Chase, as compensation for his services, a sum of money equal to fifty per cent. of any amount that he may recover, either by way of suit or compromise, and the said John D. Davis hereby expressly agrees not to enter into any compromise or accept any sum of money in settlement of said claim unless said George P. Chase is present and directs said settlement. Witness our hands this 23d day of February, 1898. [Signed] J. D. Davis. George P. Chase."

Mr. Greenhood, in his work on Public Policy, at page 474, says: "A contract by which the control of the party in interest over litigation carried on in his behalf is limited, is void." This view finds full support in the cases. In *Lewis v. Lewis*, 15 Ohio 715, the court said: "A contract with an attorney to prosecute a suit containing a stipulation that the party should not have the privilege to settle or discontinue it, without the assent of the attorney, would be so much against good policy that the court would not enforce it." In *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100, 112, 49 N. E. 222, 44 L. R. A. 177, the supreme court of Illinois, speaking by Phillips, C. J., said: "The second proposition to be determined is, is a contract by which the person in whose name the action is brought,

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and to whom it belongs, restricted from compromising or settling such claim because of a contract to that effect? In other words, is such a contract valid and binding? * * * Whether a cause of action exists, and if so, its nature and amount, are facts always involved in uncertainty, and a defendant has a right to buy his peace. The plaintiff has a right to compromise, and avoid the anxiety resulting from a cause pending to which he is a party. Any contract whereby a client is prevented from settling or discontinuing his suit is void, as such an agreement would foster and encourage litigation." The supreme court of Arkansas has thus expressed itself upon the subject: "It is a wise public policy to allow the parties to a lawsuit, or to disputes that have not even progressed to the proportion and dignity of a lawsuit, to settle their differences without hindrance from disinterested parties. Parties should be permitted to beg or buy their peace at any time. It would be difficult to estimate the monstrously unjust consequences that might result to parties willing and ready to settle a demand of this kind, if it lay in the power of an attorney to impede or control such settlement." *Davis v. Webber*, 66 Ark. 190, 198, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. 81. "The law," said Judge Dillon, in deciding the case of *Ellwood v. Wilson*, 21 Iowa 523, "encourages the amicable adjustment of disputes; and a construction of a contract which would operate to prevent the client from settling will not be favored." To the same effect, see *Boardman v. Thompson*, 25 Iowa 487.

Counsel for appellee Chase do not attempt to dispute the correctness of the doctrine that the above authorities announce, but they seek to parry its force by contending that the agreement of the client not to compromise only required that the attorney should be present to advise the client in the effecting of a settlement. The verb "directs" ordinarily implies a pointing out with authority, or directing as a superior. If that is not the meaning of the word in the contract under consideration, and if it means only to guide

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or advise, we do not understand why the client was required to "expressly" agree that in the event of a compromise his attorney should be present to guide or advise him. And it is still more difficult to understand why, if the settlement took the course that the contract contemplated it might take,—of an acceptance of a sum of money by the client in settlement of the claim,—it was so important to himself to have his attorney present to advise him that he must needs "expressly" bind himself in advance that he would not settle unless his attorney—and that particular attorney—was present to advise about such a comparatively simple matter as the receiving of a sum of money, and the execution of a receipt or a quitclaim deed. The theory of counsel is weak. It is evident that the purpose of the provision was to enable the attorney to prevent the client from making a settlement or compromise that the attorney might regard as disadvantageous to himself. It is plain that the provision, when construed according to the evident intent of the parties, is against public policy, and that there can be no recovery upon the contract sued on. As said in *Davis v. Webber, supra*: "This clause was fatal to the entire contract. It is not severable from it. It seems to have been an inducement for entering upon the contract. It is impossible for us to say that the parties would have entered upon the contract at all without this clause." The demurrer of appellants to each of the paragraphs of complaint of appellee Chase should have been sustained.

Counsel for said appellees are in serious error in asserting that under paragraphs of complaint counting on a special contract there may be a recovery on an implied contract. *Board, etc., v. Gibson*, 158 Ind. 471.

The appellees Kreider were judgment creditors of appellant John D. Davis, and were made parties defendant to the cause by appellee Chase after the case reached the court below on change of venue. Said appellees Kreider entered their voluntary appearance to the action, and filed

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a cross-complaint, in which they sought to recover on their judgment, as a cause of action, against appellant John D. Davis, and to have said land subjected to the payment of their judgment. The appellants appeared specially to the cross-action, and filed a plea to the jurisdiction of the White Circuit Court, alleging that at the date of the commencement of the cross-action, and at the date of the commencement of the original action, they were residents of Carroll county, Indiana, and that by collusion between the original plaintiff and said cross-complainants the latter had been made parties to the action for the purpose of enabling them to file said cross-complaint. As the complaint of appellee Chase alleged that appellees Kreider were claiming some interest in or lien on the real estate which Chase was seeking to reach in the hands of Elizabeth Davis, we think that they were properly made defendants, to the end that their rights in the land might be settled before the court ordered a sale thereof. There might have been what the plea, by way of legal conclusion, styles "collusion" for the purpose of enabling the appellees Kreider to file a cross-complaint, and yet the averment does not exclude the idea that they were necessary or proper parties to the original action.

There was no error in sustaining a demurrer to the plea in abatement. Upon the sustaining of such demurrer, appellants each filed a demurrer to the cross-complaint. These demurrers were together overruled. The ruling was proper as to appellant John, but improper as to appellant Elizabeth. The cross-complaint does not contain any averment as to the financial condition of said John D. Davis at the time of the filing of the cross-complaint, aside from the allegation that he had no property subject to execution "of which these plaintiffs have any knowledge." This was insufficient.

The judgment of appellees Kreider against appellant John D. Davis is affirmed. The judgment in favor of ap-

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pellee Chase is reversed, with an instruction to the court below to sustain the demurrers of each appellant to each of said appellees' paragraphs of complaint, and the judgment as against appellant Elizabeth, based on the cross-complaint of appellees Kreider, is also reversed, with an instruction to sustain her demurrer to said cross-complaint.

MANDATE MODIFIED.

PER CURIAM.—Upon a stipulation filed by appellants and appellee Chase, it is ordered that this court's mandate in the above entitled cause be modified so as to read as follows: The judgment in favor of appellee Chase is reversed, with an instruction to the court below to restate its conclusions of law by declaring the contract sued on by him to be void and to render final judgment in favor of appellants against appellee Chase. The judgment of appellees Kreider against John D. Davis is affirmed, and the judgment of said Kreiders as against appellant Elizabeth is reversed, with instructions to sustain her demurrer to said Kreiders' cross-complaint, and to grant the latter leave to amend the same in the event that they apply for leave so to do.

THE STATE *v.* PATTON.

[No. 19,756. Filed October 8, 1902.]

PRIZE-FIGHTING.—*Information.*—*Sufficiency.*—An information alleging that defendant, in pursuance of a previous arrangement and appointment with another, did unlawfully engage as principal in a fight with that other with their fists, for a wager, sufficiently charges the crime of prize-fighting, under §2062 Burns 1901. *pp.* 249-251.

APPEAL.—*Index.*—*Marginal Notes.*—*Presumption.*—Where a record comes to the Supreme Court with a proper index and marginal notes, it will be presumed, in the absence of a showing that they were added after the filing, that they were added before the transcript was filed in this court. *p.* 252.

From Sullivan Circuit Court; *O. B. Harris*, Judge.

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Robert Patton was charged with prize-fighting. From a judgment sustaining his motion to quash the information, the State appeals. *Reversed.*

W. L. Taylor, Attorney-General, *C. C. Hadley*, *Merrill Moores*, *E. W. McIntosh* and *W. H. Bridwell*, for the State.
J. T. Hays and *W. H. Hays*, for appellee.

HADLEY, J.—Appellee was arraigned for trial upon the following charge: “That Robert Patton, late of said county, on the 25th day of June, 1901, at and in the county of Sullivan and State of Indiana, by and in pursuance of a previous arrangement and appointment with William Dickerson so to do, did then and there unlawfully engage as a principal with said William Dickerson in a fight between each other with their fists for and upon a certain wager, which wager is to the prosecuting attorney unknown.” Appellee’s motion to quash was sustained, and the State appeals. The charge is predicated on this statute: “Whoever engages as principal in any prize-fight, or attends any such fight as a backer, trainer, second, umpire, assistant, or reporter, shall be fined,” etc.

No question is made as to the validity of the statute, but the sole contention is whether the facts set forth in the information constitute a prize-fight within the meaning of the statute under a proper construction thereof. Appellee insists that the charge is insufficient for failure to describe the encounter in the language of the statute; that is, for failure to charge that the “defendant did unlawfully engage, as a principal, in a prize-fight.” Whether the charge, if made as appellee insists it should have been, would be good or bad, we are not called upon to decide. Our only task is to determine whether the one before us sufficiently states the public offense of prize-fighting. That which is essential to a criminal charge is that the indictment or information shall set forth with reasonable precision and certainty all the elements necessary to constitute the offense meant to be

punished, and will advise the defendant of the things which he is called upon to answer. What is necessary to an indictment is thus defined by the statute: "The indictment or information must contain—*First*. The title of the action, specifying the name of the court to which the indictment or information is presented and the names of the parties. *Second*. A statement of the facts constituting the offense, in plain and concise language without unnecessary repetition." §1800 Burns 1901. The language used in clause second is precisely the language employed in clause second of §341 Burns 1901, which declares the requisite of a complaint in a civil action. The whole purpose of the legislature, in the enactment of both the civil and criminal code, was to do away with useless forms, repetition, and technicality, and thus bring the procedure in both classes of action to the "common understanding."

When a statute specifically, and with certainty to a common intent, defines what facts shall constitute an offense, it is usually sufficient to charge the crime in the language of the statute, but statutory language is usually insufficient where the offense is not defined by the statute. *Ledgerwood v. State*, 134 Ind. 81, and cases cited; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117; *Hopewell v. State*, 22 Ind. App. 489, 492.

It is proper, if not necessary, in all cases to set forth in the indictment or information the facts relied upon by the State in "plain and concise language," and from those facts the court will determine whether the charge comes within the prohibition of the statute, and its proper name or designation. The real character of a charge is not affected, one way or another, by any term or appellation which the grand jury or prosecuting attorney may give to or withhold from it. "Where the definition of an offense, whether by rule of common law or by statute," says a distinguished author, "includes generic terms (as it necessarily must), it is not sufficient that the indictment should charge the of-

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fense in the same generic terms as in the definition, but it must state the species—it must descend to particulars.” 1 Archibald’s Cr. Proc., 88; 10 Ency. Pl. & Pr., 480, and cases collated.

When a public offense has been declared by statute and punishment fixed therefor, without definition,—as now well established may be done in this State,—the courts will resort to the common law, and the general import of the language used, to determine the sufficiency of the charge within the general terms of the statute. *Ledgerwood v. State*, *supra*, p. 89; *Hedderich v. State*, 101 Ind. 564, 572, 51 Am. Rep. 768.

It remains to be seen if the facts alleged in the information sufficiently states the public offense of prize-fighting. Webster defines a prize-fight to mean “An exhibition contest, especially one of pugilists, for a stake or wager,” and the Century Dictionary defines the same term as “A pugilistic encounter, or a boxing match for a prize or wager.” For the views of other courts as to the popular meaning of the term arising upon similar statutes, see *Seville v. State*, 49 Ohio St. 117, 30 N. E. 621, 15 L. R. A. 516; *People v. Taylor*, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287; *Commonwealth v. Barrett*, 108 Mass. 302. “Prize-fight” is a phrase of common use, and its employment indicates what is meant as clearly and distinctly as other English terms. When it is said that one, in pursuance of a previous arrangement and appointment with another, did unlawfully engage as principal in a fight with that other with their fists, for a wager, there is, by one of ordinary understanding, no mistaking the nature of the act. Such an act is at once understood to mean “a pugilistic encounter for a prize or wager.” The facts alleged in the information constitute a prize-fight within the meaning of the statute, and, being otherwise formal, is sufficient to put the appellee upon trial for that offense.

Appellee objects to a consideration of this appeal for want of an index, marginal notes, and numbered lines upon the transcript, as required by the rules of this court. As the record comes to us all these things are supplied in accordance with the rules, and, in the absence of a proper showing that they were added after the filing, we must presume that they were added before the transcript was filed in this court.

Judgment reversed, with instructions to overrule the motion to quash, and for further proceedings in accordance with this opinion.

BURKE ET AL. v. MEAD ET AL.

[No. 19,540. Filed October 9, 1902.]

STATUTE OF FRAUDS.—*Contract Signed by One Party.*—The signatures of the owners of real estate to a proper memorandum of a contract of sale is sufficient to take the contract out of the statute of frauds as to them, although the contract is not signed by the other parties thereto. pp. 255, 256.

CONTRACT.—*To Convey Realty.*—*Mutuality of Parties.*—A written contract to sell real estate, resting upon a sufficient consideration, signed by the owner and accepted by the purchaser, is not invalid for want of mutuality. p. 256.

SPECIFIC PERFORMANCE.—*Enforceable Contract.*—Courts of equity require as a prerequisite to a decree of specific performance, that, after summoning all evidence with which it is admissible to support the contract, its provisions shall be clear and specific in all of their essential elements. p. 256.

SAME.—*Contract.*—*Uncertainty.*—Since the *status* of both parties in a suit for specific performance is to be changed if a decree goes in favor of plaintiff, uncertainty in reference to plaintiff's duty is quite as fatal an objection to the granting of equitable relief as uncertainty in reference to defendant's obligations. pp. 257.

CONTRACTS.—*Uncertainty.*—*What is Implied.*—The law is a component part of every contract that contains provisions which are open to legal interpretation; therefore terms which the law implies need not be expressed. pp. 257, 258.

SAME.—*Consideration.*—*Uncertainty.*—*Parol Evidence.*—*Statute of Frauds.*—Where a contract for the sale of real estate states the consideration indefinitely parol evidence is admissible to explain the ambiguity. p. 258.

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SPECIFIC PERFORMANCE.—Complaint.—Default.—In a suit for specific performance, a complaint is not good on demurrer which does not allege facts that would be sufficient upon default to enable the court to draft its decree from such averments. p. 259.

SAME.—Indefinite Contract.—Complaint.—Where by the terms of a contract it was provided that the purchaser of real estate should pay to the owner a certain part of the consideration in cash, and the remainder in stock in a corporation to be organized, a complaint for the specific performance of the contract which does not allege the kind of business to be conducted by the corporation, and where the business was to be conducted, is insufficient on demurrer. pp. 259, 260.

SAME.—Complaint.—Where a contract for the sale of real estate authorized a report from the purchaser, within five days, of his inability to accept the offer, a general averment in a complaint for specific performance, of performance of conditions by plaintiff is insufficient. p. 259.

CORPORATIONS.—Powers too Broad.—De Jure Corporation.—Where the powers of a corporation as set out in its articles are broader than authorized by the statute under which the corporation is organized the organization does not become a *de jure* corporation. pp. 259, 260.

SAME.—Incidental Powers.—The manufacture and sale of "all kinds of electrical appliances, apparatus and supplies" is not an incidental power of a corporation organized for the purpose of "manufacturing, storing, selling, and distributing electricity for light, heat, and power," etc. pp. 260, 261.

SPECIFIC PERFORMANCE.—Contract.—Uncertainty.—Complaint.—Where by the terms of a contract to convey land, by the terms of which a part of the consideration was to be paid in stock in a corporation to be organized, the nature of which corporation not being set out in the contract, an allegation in a complaint for specific performance, that, "after repeated conferences with plaintiffs, defendants, with full knowledge of all the facts, and in contemplation thereof and the proposed corporation, signed and delivered the contract," is not a sufficient allegation as to the character of the corporation agreed upon. pp. 262, 263.

SAME.—Complaint.—Demand.—Waiver.—In a suit for the specific performance of an indefinite contract, the plaintiff is not relieved from pleading extraneous facts necessary to support the contract on the ground that defendant by making specific objections at the time of plaintiff's tender of performance waived all others. p. 263.

SAME.—Contract to Take Corporation Stock.—Complaint.—Where the subscription of the whole capital stock of a corporation is a condition precedent to the enforcement of an executory contract to take stock, a complaint for the specific performance of such execu-

tory contract which shows on its face that all the capital stock was not subscribed, and contains no offer so to do is insufficient. p. 265.

SPECIFIC PERFORMANCE.—*Complaint.*—*De Jure Corporation.*—Where, in a suit for the specific performance of a contract to take stock in a corporation to be organized, a complaint alleging facts showing that the corporation would not, if so organized, be a *de jure* corporation, is insufficient on demurrer, although it contains the specific allegation that the incorporation was in all respects under and pursuant to the laws of Indiana. pp. 265, 266.

Appeal from Wabash Circuit Court; *H. B. Shively*, Judge.

Suit by Benjamin F. Burke and others against Merritt C. Mead and others. From a judgment for defendants, plaintiffs appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

G. A. Henry, P. H. Elliott, M. E. Forkner and A. H. Plummer, for appellants.

W. H. Carroll, G. D. Dean and S. W. Cantwell, for appellees.

GILLETT, J.—The appellants filed their complaint in five paragraphs to obtain a decree for the specific performance of a contract by appellees. The latter successfully demurred to each paragraph of the complaint. A decree followed, that appellants take nothing by their suit, and the latter assign errors, based on said rulings on demurrer. Each paragraph of the complaint sets out, either in the body of the paragraph or as an exhibit thereto, a writing that it is alleged that appellees executed to appellants. The following is a copy of said writing: “Marion, Indiana, May 13, 1899. This agreement, made and entered into this 13th day of May, 1899, by and between M. C. Mead & Co., of Marion, Indiana, party of the first part, and Benjamin F. Burke and Wm. H. Anderson, party of the second part, witnesseth: That the party of the first part for and in consideration of the sum of \$25,000 to them agreed hereby to be paid by the party of the second part, the receipt

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of \$5 of which is hereby acknowledged, and the delivery by the said second party to the said first party within sixty days from this date the further amount of \$23,500 in paid-up capital stock of a corporation to be by said second party organized and incorporated, capital stock \$120,000, to be known as the Marion Electric Company, the said first party hereby agrees to sell, transfer, convey, and deliver with good and perfect title, free from liens and encumbrances, to said second party, the electric lighting and power plant now owned by said first party, located at Marion, Ind., with all the engines, boilers, machinery, poles, lines, cables, appliances and apparatus thereto belonging, together with all rights of way, gas rights, etc., and including the following described real estate, with the buildings and fixtures erected thereon, to wit: All that part of lot number twenty in White's second addition to the town, now city, of Marion, which lies east of Boots creek; also south half of lot number nineteen in White's second addition to the town, now city, of Marion, Grant county, Indiana. Said deed of conveyance to be executed by said first party within five days from this date, and placed in escrow with the Marion Bank, in Marion, Indiana, to be delivered by said bank to said second party upon their payment and delivery to said bank, for said first party within sixty days from this date, the stock above mentioned; and said second party upon their part agree to make said payment of cash within ten days, and said delivery to said bank within the time above mentioned, both cash and stock, or report to first parties within five days their inability to accept first parties' offer. In witness whereof the parties hereto have set their hands this day and date above written. [Signed] M. C. Mead & Co."

It is unnecessary to set out the several paragraphs of complaint. Some particulars of each of said paragraphs will, however, be stated hereafter. We deem it best to consider first, in a general way, some propositions that relate to most, if not all, of said paragraphs.

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It was not necessary that the appellants should have signed the contract. The signatures of appellees to a sufficient note or memorandum would take it out of the statute of frauds as to them. §6629 Burns 1901; *Newby v. Rogers*, 40 Ind. 9. The requirement of mutuality in a contract does not mean that there must be a mutuality of remedy. *Grove v. Hodges*, 55 Pa. St. 504, 516. A proposition in writing to sell real estate upon certain terms that is signed by the owner, and is not a mere offer, but rests upon a distinct consideration, may become binding upon a seasonable acceptance. Clark, Cont., 22, and see *Cherry v. Smith*, 3 Humph. 19, 39 Am. Dec. 150; *Souffrain v. McDonald*, 27 Ind. 269; *Street v. Chapman*, 29 Ind. 142; *Fairbanks v. Meyers*, 98 Ind. 92; *Indianapolis Nat. Gas Co. v. Kibbey*, 135 Ind. 357. It follows, therefore, that the contract that is here sought to be enforced does not stand condemned as lacking in mutuality.

We shall not, at this point, discuss the extent that it is permissible to reënforce a written contract by parol evidence. Courts of equity do, however, strenuously require, as a prerequisite to a decree of specific performance, that, after summoning all evidence with which it is admissible to support the contract, its provisions shall be clear and specific in all of their essential elements. Mr. Justice Story, in his work on Equity Jurisp. (13th ed.), at §764, after stating that in former times able judges felt themselves at liberty to frame a contract for the parties, *ex aequo et bono*, where it found none, says: "Such a latitude of jurisdiction seems unwarrantable upon any sound principle, and accordingly it has been expressly renounced in more recent times." The following authorities fully support the later doctrine: *Gas Light, etc., Co. v. City of New Albany*, 139 Ind. 660; *Louisville, etc., R. Co. v. Bodenschatz, etc., Co.*, 141 Ind. 251; *Robbins v. McKnight*, 5 N. J. Eq. 642, 45 Am. Dec. 406; *Stanton v. Miller*, 58 N. Y. 192; *Atwood v. Cobb*, 16 Pick. 227, and many cases cited in note to this

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case as reported in 26 Am. Dec. 657; *Hamilton v. Harvey*, 121 Ill. 469, 13 N. E. 210, 2 Am. St. 118; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 South. 449, 3 Am. St. 758; *Minnesota Tribune Co. v. Associated Press*, 27 C. C. A. 542, 84 Fed. 921; *Russell v. Agar*, 121 Cal. 396, 53 Pac. 926, 66 Am. St. 35; *Whitehill v. Lowe*, 10 Utah 419, 37 Pac. 589. The reason for the requirement of certainty is thus pointed out by a well known writer on specific performance: "To sustain the latter proceeding [an action for damages], the proposition required is the negative one, that the defendant has not performed the contract—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; whilst in proceedings for specific performance it must appear not only that the contract has not been performed, but what is the contract which is to be performed." Fry, Spec. Perf. (3d Am. ed.), §361.

As the *status* of both parties is to be changed if a decree goes in favor of the plaintiff, it is evident that uncertainty in the contract as to the plaintiff's duty is quite as fatal an objection to the granting of equitable relief as uncertainty as to the defendant's obligation. *Louisville, etc., R. Co. v. Bodenschatz, etc., Co.*, 141 Ind. 251, 265; *Agard v. Valencia*, 39 Cal. 292. This view finds at least implied expression in the following language of Mr. Justice Washington, used in the opinion of the court in *Colson v. Thompson*, 2 Wheat. 336, 340, 4 L. Ed. 253: "The contract which is sought to be specifically executed, ought not only to be proved, but the terms of it should be so precise as that neither party could reasonably misunderstand them. If the contract be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy."

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It is to be recollected, however, with reference to the elements of certainty generally, that terms which the law implies need not be expressed, because the law is a component part of every contract that contains provisions that are open to legal interpretation. *Foulks v. Falls*, 91 Ind. 315; *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87; *Friebert v. Burgess*, 11 Md. 452; *Cooper v. Hood*, 26 Beav. 293; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 288, 19 L. Ed. 349.

Appellees' counsel insist that certain averments of the several paragraphs of complaint relative to the contract are not to be considered, because of the effect of the statute of frauds where contracts lie in parol. We find ourselves unable to agree entirely with them. The old time controversy as to whether the note or memorandum must show the consideration on which the defendant's promise was founded was set at rest in this State in 1853 by the following provision that was enacted as a part of the statute of frauds: "The consideration of any such promise, contract or agreement need not be set forth in such writing, but may be proved." §6630 Burns 1901. See *Hiatt v. Hiatt*, 28 Ind. 53. In the contract under consideration it is plainly stated what appellees were required to do, and, if the writing had not attempted to state the consideration for their promise, it is clear that under our statute it would have been competent to allege and prove the consideration. The writing does, however, undertake to state the consideration, but, as we shall hereafter show, states it indefinitely, and we think that it is competent to relieve the ambiguity to the extent that it is competent to explain other ambiguous writings not relating to transactions within the statute of frauds. Even statements that are of a contractual character, not made as mere recitals, are subject to explanation to the extent of identifying the subject-matter which is described in the contract in language too general to admit of specific application. *Kieth v. Kerr*, 17 Ind. 284; *Mace v. Jackson*,

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38 Ind. 162; *Heath v. West*, 68 Ind. 548; *Martindale v. Parsons*, 98 Ind. 174; Jones, Law of Ev., §445; Parsons, Cont. (5th ed.), 562, 563, 564.

The first paragraph of the complaint counts upon the written contract, and does not allege any extraneous matters, except that it contains a general allegation of performance upon the part of appellants. We think that this paragraph is insufficient. It ought to have alleged facts that would have been sufficient upon a default to have enabled the court to draft its decree from the averments. It can not be determined from the written contract alone what kind of a business the corporation was to be organized to conduct, or where such business was to be conducted. These were material matters. *Dorris v. Sweeney*, 60 N. Y. 463; *Marysville, etc., Co. v. Johnson*, 109 Cal. 192, 41 Pac. 1016, 50 Am. St. 34. A general averment of performance of a condition precedent is sufficient under the code. §373 Burns 1901. But such averment will not suffice to avoid ambiguities in the contract. The appellants may have fully performed the letter of their contract, but the court, sitting as a court of equity, should have been advised as to what kind of a business engagement or speculation it was called on to require appellees to engage in. As the writing authorized the appellants, in lieu of a deposit of the stock and a payment of the money, to "report to first parties, within five days, their inability to accept first parties' offer," we think, in view of the omission of any allegation that appellants did accept the proposition, that it may be inferred that their alleged performance related to the latter alternative. See *Street v. Chapman*, 29 Ind. 142, 152. For this further reason, we think that the first paragraph of complaint was insufficient.

The second paragraph of complaint, in addition to the general allegation of performance, alleges specifically what appellants did under the contract. One of the allegations upon this subject is that "said Marion Electric Company

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was duly incorporated on the 16th day of May, 1899, with a capital stock of \$120,000, for the purpose, as set out in its articles of association, of manufacturing, storing, selling, delivering, and distributing electricity for light, heat, power, and for all such other chemical and mechanical purposes as electricity can be applied to, and for the purpose of manufacturing and selling all kinds of electric appliances, apparatus, and supplies." This paragraph is also lacking in the averment of any extrinsic facts as to what kind of a corporation was to be organized according to the contract of the parties. The appellants have simply determined for themselves what kind of a corporation they would organize, and they ask the court to compel appellees to purchase of them a block of paid-up stock in such corporation. This is not a case where stock has already been taken, and the action is to compel the subscriber to pay for it, for the contract in this case was merely executory, and the corporation was not organized at the time the contract was entered into. Mr. Morawetz, in his work on Private Corporations (2d ed.), at §52, says: "An offer or contract to become a shareholder in a corporation, or to subscribe for shares thereafter, does not become binding or create a liability until all conditions precedent, upon which the offer or contract was made, have been performed." It is our opinion also that the paragraph of complaint under consideration shows on its face that the Marion Electric Company is not a *de jure* corporation. Appellees were not required to take stock in a corporation whose only existence was of a *de facto* character. *Williams v. Citizens Enterprise Co.*, 153 Ind. 496.

We think that the generating of electricity is manufacturing within our manufacturing and mining companies act (§5051 *et seq.* Burns 1901; 10 Am. & Eng. Ency. Law (2d. ed.), 862), but we do not think that the manufacture and sale of "all kinds of electric appliances, apparatus, and supplies" is a business incident thereto. See

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Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. 302; *Williams v. Citizens Enterprise Co.*, 25 Ind. App. 351. In *People, ex rel., v. Chicago Gas Trust Co.*, 130 Ill. 268, 283, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. 319, it was said: "An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it," citing *Hood v. New York, etc., R. Co.*, 22 Conn. 1, and *Franklin Co. v. Lewiston, etc., Inst.*, 68 Me. 43, 28 Am. Rep. 9. In *Nicollet Nat. Bank v. Frisk-Turner Co.*, 71 Minn. 413, 74 N. W. 160, 70 Am. St. 334, it was held that the purchase of ready-made clothing was not an incident to the business of manufacturing such clothing. "The exercise of a power that might be beneficial to the principal business is not necessarily incident to it." *Nicollet Nat. Bank v. Frisk-Turner Co.*, *supra*; *State, ex rel., v. Minnesota, etc., Co.*, 40 Minn. 213, 222, 41 N. W. 1020, 3 L. R. A. 510. According to averment, said corporation not only proposes to engage in the business of "manufacturing, storing, selling, delivering, and distributing electricity for light, heat, and power," etc., but it has also organized to engage in the multiform activities involved in the manufacture and sale of all kinds of electrical appliances, apparatus, and supplies. Without attempting to lay down any exact rule as to what is an incident of a principal power, we hold that the paragraph of complaint under consideration was properly held insufficient, because it discloses a purpose to engage in lines of employment and business more diverse than the statute authorizes. The proposition proposed only illustrates how ambiguous the written contract is that forms the basis of this suit. It can not be determined from such contract what the parties contemplated should be the scope of the corporate endeavor.

The following language of the New York Court of Appeals in *Dorris v. Sweeney*, 60 N. Y. 463, 468, seems quite

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apposite here: "A legal and effectual formation of a corporation or joint stock company for the purpose specified in the contract was a condition precedent to his obligation to put in his capital. He would not be bound under such a contract to invest his capital in the stock of a corporation not legally formed, or which had not obtained the franchise of carrying on the business contemplated by the contract, and in which he had agreed to become interested. * * *

The insuperable difficulty in the way of sustaining this action is, that the only business in which the defendant agreed to embark was that of preserving fruits by the method described in Nyce's patent. He did not agree to invest capital in any other business. The corporation actually formed included, in addition to that of thus preserving fruits, those of manufacturing preserved fruits, and of canning fruits. He had never agreed to engage in those branches of business, and yet if he were compelled to pay in his money and take stock in the corporation actually formed, the capital might have been employed in manufacturing preserves and canning fruits, even to the exclusion of the patented process, which was the sole subject of the contract he had made." The second paragraph of the complaint was clearly insufficient.

Appellants' third paragraph of complaint proceeds on the theory that the contract was partly oral and partly written. After setting out a great many evidentiary facts as to the character of the business that appellees were engaged in, and that appellants had procured from the city of Marion a franchise, the exercise of which would bring them into competition with appellants, and that there were overtures and negotiations between the parties looking to a consolidation of their interests, the paragraph alleges "that, after repeated conferences and negotiations, the defendants, with a full knowledge of all of the facts aforesaid, and in contemplation thereof and the proposed organization of said company, signed, executed, and delivered to these

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plaintiffs" the writing hereinbefore set out. The evidentiary matters stated might lead a court to conclude therefrom, as a matter of evidence, that the character of the corporation was agreed on, but we think that the pleading is lacking in any definitive allegation as to what the oral agreement was. The allegation of performance does not aid this paragraph, because it affirmatively appears that there was only a tender of performance, and the statute does not authorize a general allegation of a mere tender of performance. *Newby v. Rogers*, 40 Ind. 9.

The fourth paragraph of complaint counts upon the written contract unaided by any extrinsic averment, but it seeks to avoid other objections that the appellees might have to the contract by alleging that, upon a tender of performance, appellees made only one objection, and that that related to the control and management of the company. The proposition urged in support of this paragraph,—that by the making of a particular objection all others were waived,—is not controlling. We do not regard as applicable the general rule declared in *Bartlett v. Adams*, 43 Ind. 447, 449, "that if, when a demand is made, a specific objection is made as a reason for not complying with the demand, all others, which if made might be readily obviated, are waived." The objection lies deeper than a mere question of performance, because it is a question as to what was the contract. Without the aid of parol evidence, the written instrument was hopelessly uncertain and did not bind appellees specifically to perform it. This paragraph of complaint is also insufficient because it shows on its face that all of the capital stock was not subscribed, and there was not even an offer so to do. *Nemaha Coal, etc., Co. v. Settle*, 54 Kan. 424, 38 Pac. 483; *Baker v. Ft. Worth Board of Trade*, 8 Tex. Civ. App. 560, 28 S. W. 403; *Rockland, etc., Co. v. Sewall*, 78 Me. 167, 3 Atl. 181; *Stearns v. Sopris*, 4 Col. App. 191, 35 Pac. 281; *Norwich Lock Mfg. Co. v. Hockaday*, 89 Va. 557, 16 S.

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E. 877; *International, etc., Assn. v. Walker*, 88 Mich. 62, 49 N. W. 1086.

In the last case cited it is said, at page 76: "A corporation without subscribed capital would be a mere bubble, without responsibility, and liable to do great mischief in the mercantile world, putting forth false bases of credit, and preying upon the community by reason of such deception. The rights of every subscriber to the stock depend upon the full amount being subscribed. These enterprises are entered into for the purpose of gain and profit. It is essential to the member that his rights and liabilities as a member should be fixed when he enters into the engagement by his subscription. The capital which is named in the articles of association and the shares specified are known to him when he subscribes, and by this he knows that his subscription comprises an aliquot part of the entire capital of the corporation; that when calls are made they are based upon the whole capital authorized; and that he can not be called upon to pay more than his share for the purpose required, which would be the case if calls could be made before the whole amount of the capital is subscribed. Such capital is usually fixed at such a sum as the subscribers consider necessary, or that will be required to secure the object for which the corporation is formed; and it might, and probably would, be disastrous to the enterprise to embark in the undertaking before the whole capital was secured by actual subscriptions. *Railroad Co. v. Johnson*, 30 N. H. 390, 407; *Railroad Co. v. Barker*, 32 N. H. 363; *Manufacturing Co. v. Parker*, 14 N. H. 543; *Insurance Co. v. Hart*, 31 Md. 60; *Hughes v. Manufacturing Co.*, 34 Md. 332; *Railroad Co. v. Cushing*, 45 Me. 524; *Railroad Co. v. Clarke*, 61 Me. 384; *Railroad Co. v. Preston*, 35 Iowa 118; *Livesey v. Hotel Co.*, 5 Neb. 50; *Bridge Co. v. Cummings*, 3 Kan. 69; *Railroad Co. v. Hunt*, 39 Conn. 75; *Wontner v. Shairp*, 4 C. B. 404; *Navigation Co. v. Theobald*, 1 Moo. & Mal. 151; *Fox v. Clifton*, 6 Bing. 776;

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Railway Co. v. Dalbiac, 6 Eng. Rul. Cas. 753; *Railway Co. v. Veazie*, 39 Me. 571; *Fray v. Railroad Co.*, 2 Metc. (Ky.) 323; *Railroad Co. v. Gould*, 2 Gray 277."

The cases of *Newcastle, etc., Co. v. Bell*, 8 Blackf. 584, *Eakright v. Logansport, etc., R. Co.*, 13 Ind. 404, *Brownlee v. Ohio, etc., R. Co.*, 18 Ind. 68, *Hoagland v. Cincinnati, etc., R. Co.*, 18 Ind. 452, and *Fox v. Allensville, etc., Co.*, 46 Ind. 31, are based upon the provisions of materially different statutes, or are cases where the subscription was made to the capital stock of a corporation already organized. In this case no question is involved as to the rights of the corporation or of its creditors, for the action is by the owners of certain shares of stock to compel other persons to take the same by reason of a contract.

Under the authorities we have cited, a subscription to the whole capital stock is a condition precedent to the enforcement of a merely executory agreement to take stock. Even if, by failure to object to the manner of performance, the appellees can not object to a decree going, and even if the capital stock might be subscribed after incorporation and before the corporation undertakes to do business,—a point that we do not decide,—yet appellees, even under the rules of equity practice, were entitled to a performance of the contract in the particulars named before the entry of the decree, and it was, therefore, necessary that there should have been an offer to perform in the complaint.

The fifth paragraph of complaint sets out the written contract, and alleges the extrinsic matters contained in some of the other paragraphs. Although it discloses that but \$110,000 of the capital stock was subscribed, yet it contains an offer to subscribe and pay for the balance. It also shows that the appellees, having notice of the manner of performance, refused to perform, on the ground that appellants would not agree that appellees should have the management and control of the corporation. It is, however, alleged that appellants determined to organize an "electric company for

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the purpose of manufacturing, storing, selling, delivering, and distributing electricity, for light, heat, power, and for all such other chemical and mechanical purposes as electricity can be applied to, and for the purpose of manufacturing and selling all kinds of electrical appliances, apparatus, and supplies;" that they informed appellees "that they proposed to organize a corporation for the purpose contemplated by them;" that appellees "with a full knowledge of all of the facts aforesaid, and in contemplation thereof," executed the writing we have before set out. In a subsequent portion of the paragraph it is alleged that said corporation "was then and there duly formed and incorporated in all respects under and pursuant to the laws of Indiana for the objects and purposes contemplated as aforesaid and as provided in said agreement." As we have seen, the writing did not provide what the character of the corporation was to be. The pleading therefore plainly refers to the objects and purposes we have above set out. We think that the allegation that the corporation was incorporated for said objects and purposes controls the conclusion that the corporation was incorporated "in all respects under and pursuant to the laws of Indiana." The corporation was therefore, as before stated, not of a *de jure* character, and as the act of incorporation plainly contravened the policy of the State not to grant so broad a charter, it is our opinion, notwithstanding appellees' waiver, that appellants are not in a situation to ask the aid of a court of equity in the consummation of their project. We have now considered the rulings of the court below on each of the paragraphs of complaint filed, and we find no error.

Judgment affirmed.

Town of Greenwood v. State, *ex rel.*

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REL. LAWSON ET AL.

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[No. 19,764. Filed October 9, 1902.]

MUNICIPAL CORPORATIONS.—*Street Improvements.*—*Acceptance.*—*Administrative Act.*—In determining whether a street improvement has been completed according to law, a town board acts in an administrative and not in a judicial capacity. *p. 269.*

SAME.—*Street Improvements.*—*Work Not According to Contract.*—*Power of Town Trustees.*—The board of trustees of a town has the power at any time before the assessment of benefits has been made by such board, under §4294 Burns 1901, against lots and parcels of ground benefited, to set aside and vacate an order requiring the town engineer to make the final estimate and report, on the ground that the improvement was not made according to the contract. *p. 270.*

From Johnson Circuit Court; *W. J. Buckingham*, Judge.

Mandamus by the State on the relation of Frank Lawson and others against the town of Greenwood and others. From a judgment for plaintiffs, defendants appeal. *Reversed.*

E. A. McAlpin, R. M. Miller and H. C. Barnett, for appellants.

Douglass Dobbins, R. O. Hawkins, H. E. Smith, J. F. Carson, C. N. Thompson, Albert Baker and Edward Daniels, for appellees.

MONKS, J.—The relators, contractors for the construction of a public work under the Barrett law, brought this proceeding to compel the board of trustees of the town of Greenwood, by writ of mandamus, to take action upon the report made by the town engineer, under §4293 Burns 1901, §6776 Horner 1901, and either to “adopt, alter, or amend the same,” and “cause an assessment list” to be made, as required by said law. An alternative writ was issued. Appellants filed a return in two paragraphs, the

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first of which was a general denial. A demurrer for want of facts was sustained to the second paragraph of said return. A trial of said cause by the court resulted in a finding and judgment for a peremptory writ as demanded.

It is insisted by appellants that the court erred in sustaining appellees' demurrer to the second paragraph of the return to the alternative writ. The controlling question presented by this demurrer to said paragraph of return is whether or not the board of trustees of a town, after having caused a final estimate of the total cost of an improvement and the report required by §4293, *supra*, to be made by the town engineer, and said report has been filed, has the power to rescind and set aside its action in causing said estimate and report to be made, on the ground that said work has not been completed according to contract.

Section 4293, *supra*, provides that "When any such improvement has been made and completed according to the terms of the contract therefor made * * * the board of trustees of such town shall cause a final estimate of the total cost thereof to be made by the * * * town engineer * * * and the board of trustees of such town shall require said * * * town engineer to report to * * * the board of trustees of such town the following facts touching said improvement."

The next section, being §4294 Burns 1901, §6777 Horner 1901, provides that, after said report has been filed the board of trustees of such town shall give the notice, as required by said section, of the time and place when and where a hearing can be had upon such report before a committee to be appointed for that purpose; that any person aggrieved by such report shall have the right to appear before such committee and board of trustees and make objection thereto, and shall be accorded a hearing thereon. The committee provided for in said section is required to make a report to the board of trustees recommending the adoption or alteration of said report, and the board of trustees

have the power to adopt, alter, or amend the same, and to assess against the several lots or parcels of ground the special benefits received.

Appellees insist that the act of the board of town trustees in requiring said final estimate and the report provided for in said §4293 Burns 1901, §6776 Horner 1901, was an acceptance of the work, and that said act was judicial, and could not be rescinded. We can not concur with appellees in their contention. When an improvement made under the Barrett law is completed according to the contract, it is the duty of the board of trustees of a town to cause the town engineer to make the final estimate, and to require him to make the report provided for in said section; and if such board refuse to cause said final estimate and report to be made and filed, such board may be compelled to do so by writ of mandate. When such report is made and filed, the board of trustees may be compelled to act upon it by writ of mandate.

The power to determine whether or not the improvement has been completed according to the contract is not strictly a judicial one, although the performance of such duty requires the exercise of judgment. *Ellis v. Steuben County*, 153 Ind. 91, 92, and cases cited; *City of Madison v. Smith*, 83 Ind. 502, 515, 516.

It was said by this court in *Ross v. Stackhouse*, 114 Ind. 200, 203: "It is settled that where the act or decision of a common council, or other similar body, is done or made in pursuance of notice which the law requires, and is in its nature such as to adjudicate upon, or determine, or affect the substantial personal or property rights of those notified, a decision once rendered can not ordinarily be rescinded or set aside. * * * This rule has no application, however, to matters of a merely administrative or legislative character. Bodies having cognizance of such subjects may modify, repeal or reconsider their action in regard to matters of that nature, at any time, provided the vested rights of others are

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not thereby affected. Over such matters they exercise a continuing power. *Welch v. Bowen*, 103 Ind. 252; *Board, etc., v. Fullen*, 111 Ind. 410."

The general rule is that the governing body of a municipal corporation has the power, if vested rights are not thereby interfered with, and the rights of third parties have not intervened, to rescind action previously taken. Formal reconsideration and rescission are generally unnecessary where the course afterwards pursued is inconsistent with that formerly adopted. 20 Am. & Eng. Ency. Law (2d ed.), 1215, 1216; 1 Dillon, Mun. Corp. (3d ed.), §290; Tiedeman, Mun. Corp., §98; 1 Beach, Pub. Corp., §§297, 298.

After a careful consideration of the question, we are satisfied that under the law known as the Barrett law, the board of trustees of a town has the power, at any time before the assessment of benefits has been made by such board under §4294 Burns 1901, §6777 Horner 1901, against the lots and parcels of ground benefited by said improvement, to set aside and vacate the order requiring the town engineer to make the final estimate and report required in §4293 Burns 1901, §6776 Horner 1901, on the ground that the improvement was not completed according to the contract. Whether said board has such power after the assessment of benefits is made, we need not determine in this case.

There are some allegations in the return in regard to fraudulent conduct of appellees in procuring the board of trustees to cause said estimate and report to be made. As we deem these allegations unnecessary, the argument of appellees in regard to their insufficiency is not considered.

We determine nothing as to the sufficiency of the petition and alternative writ, as this question is not discussed by counsel in their briefs.

Judgment reversed, with instructions to overrule the demurrer to the second paragraph of return, and for further proceedings not inconsistent with this opinion.

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[No. 19,596. Filed October 10, 1902.]

COURTS.—Records.—The records of a court are subject to its own control, and when jurisdiction has attached they may not be diminished or altered without the consent of the court in which the cause is pending, excepting only where such change is directed by some superior or appellate court authorized by law to make such order. *p. 274.*

SAME.—Records.—Transcript.—Mutilation.—Appeal.—Where a transcript is filed in the proper court upon appeal, and when notice is given to the appellee, if necessary, the jurisdiction of the court to which the appeal is taken is complete, and the transcript becomes a record of the court, and any addition to or diminution thereof without the leave of the court is a mutilation. *p. 275.*

CONSTITUTIONAL LAW.—Legislature no Control Over Court Records.—Extending Time for Filing Bill of Exceptions.—The act of March 11, 1901 (Acts 1901, p. 511), giving to trial courts in certain cases the power to extend the time of filing bills of exceptions, is an attempt by the legislature to exercise control over the records of the court, and is in violation of §1, article 3, of the State Constitution which provides for the exclusive character of the three departments of government. *pp. 274-278.*

SAME.—Extending Time for Filing Bill of Exceptions.—Power of Legislature.—The right of the prevailing party in the trial court to require that the bill of exceptions should be settled by the judge, and filed within the time then fixed by such judge, is a vested right, and the act of March 11, 1901, giving the trial courts in certain cases the power to extend the time of filing bills of exceptions, is unconstitutional, as impairing the obligation of contracts. *p. 275.*

APPEAL.—Mutilation of Record.—Dismissal.—The removal from the record by the appellant, of the original bill of exceptions, and the filing of a new one in accordance with the provisions of the invalid act of March 11, 1901, while a mutilation of the record, is not a sufficient cause for dismissal of the appeal where the appellant acted in good faith. *p. 279.*

TRIAL.—Verdict.—Answers to Interrogatories.—Conflict.—Although many answers to interrogatories propounded to the jury tend to sustain the theory of the appellant, a general verdict for appellee will not be overthrown thereby, unless there is an irreconcilable conflict between such verdict and answers. *p. 282.*

INSTRUCTIONS.—Incomplete.—Where an instruction is correct as far as it goes, but incomplete, it may be completed by another which supplies the defects. *pp. 283, 284.*

159	271
164	652
159	271
166	436
1108	447

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MASTER AND SERVANT.—*Safe Appliances.*—*Instruction.*—An instruction that “if an employe sustains injury in consequence of the failure or neglect of an employer to use reasonable care and diligence” to discharge the duty of providing safe machinery, then the employe, if injured without his fault, etc., would be entitled to recover, sufficiently charges that only reasonable care is required of an employer in providing safe machinery. p. 284.

INSTRUCTIONS.—*Incomplete.*—An instruction which states certain conditions under which there can be no recovery is not rendered bad because it does not state all such conditions. p. 284.

PLEADING.—*Complaint.*—*Allegation as to Notice.*—*Proof.*—An allegation of knowledge or notice includes not only actual but constructive notice; and proof either of actual knowledge, or that the defendant by the exercise of ordinary care, might have obtained such knowledge, is admissible under the general allegation of notice. p. 285.

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Action by John Gebhauer against Jesse B. Johnson and another. From a judgment for plaintiff, defendant Johnson appeals. Transferred from Appellate Court, under §1337h Burns 1901. *Affirmed.*

W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller, for appellant.

I. W. Christian, W. S. Christian, W. S. Doan and W. J. Beckett, for appellee.

DOWLING, C. J. — On May 11, 1900, John Gebhauer, who was the plaintiff below, recovered a judgment against the appellant Johnson for damages for a personal injury. After motions for judgment on the answers to interrogatories, and for a new trial, had been overruled, ninety days from May 11, 1900, were granted the defendant in which to prepare and file his bill of exceptions. Conformably to the provisions of the act of March 3, 1899 (Acts 1899, p. 384), a bill was filed by the stenographer who reported the evidence, and *after* such filing the bill was signed by the judge before whom the cause was tried. An appeal was taken by the defendant below, and a transcript containing the bill of exceptions so filed and signed was lodged in the Appellate Court. Afterwards, this court having decided,

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in *Adams v. State*, 156 Ind. 596, 599, that §6 of the act of March 3, 1899, was unconstitutional, the appellant, on April 13, 1901, over the objection of the appellee, obtained an order of the Hamilton Circuit Court, where the cause had been tried, extending the time for filing the bill of exceptions in said cause until May 1, 1901. In pursuance of this order, a second bill was prepared, and, after it was signed by the judge, it was filed in the office of the clerk of the Hamilton Circuit Court April 25, 1901. By the direction of the appellant the bill originally filed and incorporated in the transcript on this appeal was detached and removed from the records of this court, to which the cause had been transferred, without its leave, and the bill filed April 25, 1901, was substituted. The proceedings of the Hamilton Circuit Court, upon the petition of the defendant below, under the act of 1901, for an extension of time to file the substituted bill of exceptions, are made a part of the record in this court.

In making the order of April 13, 1901, the Hamilton Circuit Court acted upon the authority of an act of the General Assembly of this State approved March 11, 1901 (Acts 1901, p. 511), giving to trial courts in certain cases the power to extend the time for filing bills of exceptions.

The appellee moves to strike the transcript from the files, and to dismiss this appeal, because of the unauthorized alteration of the record by the removal of the original bill of exceptions, and the substitution of the bill of April 25, 1901.

The action of the appellant, in procuring from the trial court an order extending the time for filing a bill of exceptions, and in causing such new bill to be attached to the transcript some eight months after the transcript had been filed in the Appellate Court, was taken in pursuance of said act of 1901, *supra*. That act provided that where an attempt had been made to make the evidence a part of the

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record by a bill of exceptions prepared in pursuance of the act of 1899, *supra*, which had been held unconstitutional, the court or judge before which the case was determined might, upon proper application by the party desiring to appeal, by order, extend the time for tendering the bill of exceptions for a sufficient length of time to enable such party to prepare and tender such bill, which, upon being signed and filed, should become a part of the record to the same extent, and in the same manner, as if tendered and filed within the time originally fixed. The act further provided for the withdrawal from the transcript previously filed in the Supreme or Appellate Court, in any case then pending on appeal, of the longhand manuscript of the reporter, its delivery to the party prosecuting the appeal for the signature of the judge, its proper authentication, and its incorporation in the transcript as a part of the record.

Counsel for appellee contend that the act of 1901, *supra*, is unconstitutional and void. On the other hand, it is insisted, on behalf of the appellant, that the act is remedial and beneficent in its scope and purpose, and that it conflicts with no provision of the organic law of the State

The records of a court are subject to its own control, and when jurisdiction has attached they may not be diminished or altered without the consent of the court in which the cause is pending, excepting only where such change is directed by some superior or appellate court authorized by law to make such order. This freedom from interference or control by other departments of the government is essential to the independence of the judicial branch thereof. The legislature has no more authority to alter the records of a court than has a court to change the journal of legislative proceedings. Such exclusive control over its records is an important function of the judicial authority, and it can not be exercised either by the legislative or the executive department of the State. Const., Art. 3, §1.

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Where a transcript is filed in the proper court upon appeal, and when notice is given to the appellee, if necessary, the jurisdiction of the court to which the appeal is taken is complete, and the transcript becomes a record of that court. Such record can not be removed, altered, or amended, without the leave of the court in which the appeal is pending, and any addition to or diminution of the record, without the leave of the court is a mere mutilation or interpolation having no legal efficacy, and affording no foundation for relief or redress to the party perpetrating it. Great as is the power of the legislature, it does not enable that department of the government to come into the courts after their records are made up, and alter, add to, or destroy them. On this ground alone, which we regard as amply sufficient, the act in question might be held unconstitutional.

But for another, and equally cogent reason, we are constrained to decide against the validity of this act. It is clearly in conflict with that provision of the State Constitution which prohibits the passage of any law impairing the obligation of contracts. Const., Art. 1, §24.

A judgment is a contract of record, and its obligation is impaired whenever the observance of those forms and rules of procedure in force when it was obtained, and by which it is protected and sustained, are annulled or set aside. In the present case the rights of the parties under the judgment were fixed by the law as it stood when the final adjournment of the Hamilton Circuit Court took place. The right to require that the bill of exceptions should be settled by the judge, signed by him, and filed in the office of the clerk of the court after such signing, within the term, or within such time beyond the term as the court, before the expiration of the term, should appoint, to make it sufficient and effective to bring the evidence into the record; was a valuable vested right of the plaintiff below. His rights in this behalf, as well as the measure of those of the defend-

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ant, were established by the order of the court requiring the bill to be tendered and filed within ninety days from May 11, 1900. This right having vested, it could not be impaired or destroyed by a further order made after the term at which the judgment was rendered. If the party appealing failed to tender his bill within ninety days after May 11, 1900, his right to tender such bill was irrecoverably lost, and neither the trial court nor the legislature could restore it by depriving the other party of the legal consequences of such failure.

Mr. Justice Gray, in *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 298, 12 Sup. Ct. 452, 36 L. Ed. 162, states the law thus: "By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. *United States v. Breitling*, 20 How. 252; *Müller v. Ehlers*, 91 U. S. 249; *Jones v. Grover & Baker Co.*, 131 U. S. appx. 150; *Hunnicut v. Peyton*, 102 U. S. 333; *Davis v. Patrick*, 122 U. S. 138 *Chatsaugay Co. v. Petitioner*, 128 U. S. 544. The duty of seasonably drawing up and tendering a bill of exceptions stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party and not to the court; the trial court has only to consider whether the bill tendered by the party is in due time, in

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legal form, and conformable to the truth; and the duty of the court of error is limited to determining the validity of exceptions duly tendered and allowed. *Hanna v. Maas*, 122 U. S. 24. Any fault or omission in framing or tendering a bill of exceptions, being the act of the party and not of the court, can not be amended at a subsequent term, as a misprision of the clerk in recording inaccurately or omitting to record an order of the court might be. *In re Wight*, 134 U. S. 136, the writ of *certiorari* prayed for must therefore be denied, and the case must be determined upon the original bill of exceptions."

Again, in *Müller v. Ehlers*, 91 U. S. 249, 250, the court uses this language: "Upon the adjournment for the term the parties were out of court and the litigation there was at an end. The plaintiff was discharged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*. The order of the court, therefore, made at the next term, directing that the bill of exceptions be filed in the cause as of the date of the trial, was a nullity. For this reason, upon the case as it is presented to us, the bill of exceptions, though returned here, can not be considered as part of the record."

An order extending the time for signing a bill of exceptions is a judicial act. *Village of Marseilles v. Howland*, 136 Ill. 81, 84, 26 N. E. 495; 3 Ency. Pl. & Pr., 469, and cases cited. The legislature can not, directly nor indirectly, perform a judicial act. In an early case, it was said: "The circuit court did right in refusing to hear the new trial granted by the special act of the legislature. The legislature does not possess the power to grant a new trial in a suit at law. The Constitution of Indiana has always contained the following provision: 'The powers of the government of Indiana shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are

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judiciary, to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.' There is no section of the Constitution permitting the legislature to grant new trials. The granting of a new trial is a judicial act, and, in this State, controlled by settled rules of law. If an inferior court should, in any given case, exercise the power to grant new trials, in violation of these settled rules, this court would set aside the grant, and leave the judgment rendered unaffected. Now, the Constitution above quoted says the legislature shall not perform a judicial act. The granting of a new trial, we have seen, is a judicial act. Therefore, the legislature can not grant a new trial. And it is a power that should not be possessed by the legislature in its legislative capacity; because, in that capacity, it would not be governed by legal rules. In governments where the constitution converts the legislature, on some occasions and for some purposes, into a court, while that body is thus acting, it is governed by the same rules, and restrained in its action by the same authorities, as are courts of law. Not so where it acts simply in its legislative capacity; and to permit it to dispose of judicial questions in that capacity, would be in the highest degree dangerous to the rights of the individual members of the community." *Young v. State Bank*, 4 Ind. 301, 58 Am. Dec. 630.

The act of March 11, 1901, practically extended the time for tendering bills of exceptions in cases already finally disposed of in the trial courts, and which were pending in this Court and the Appellate Court on appeal. The grant of such an extension, under these circumstances, was a judicial act attempted under the form of a statute special in its nature and operation, and therefore not within the power of the legislature. For this reason, also, the act must be held unconstitutional.

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The foregoing ruling takes the bill of exceptions containing the evidence out of the record; but other questions are presented by the assignment of errors which may be decided without reference to the evidence.

We are asked by the appellee to dismiss the appeal, and not to consider these questions because of the supposed mutilation of the record; but we do not feel justified in doing so. In the preparation and filing of the original bill and in the subsequent proceedings for the removal of that bill and the substitution of a new bill, the appellant had the apparent authority and sanction of two express statutes which had not then been held invalid. Under these circumstances we are not disposed to subject a party who has acted in perfect good faith, and under the advice of eminent counsel, to the penalty of a wanton and inexcusable mutilation of the record. *Montgomery v. Gorrell*, 49 Ind. 230. The motion to dismiss the appeal is therefore overruled.

The refusal of the court to render judgment for the appellant on the answers of the jury to certain interrogatories is one of the errors assigned, and will be first considered. The complaint stated, in substance, that the Indianapolis Excelsior Manufacturing Company was a corporation, organized under the laws of this State, and on April 21, 1898, engaged in the manufacture of excelsior, or wood hair; that Jesse B. Johnson was the manager and proprietor of said business; that the appellee was employed by the defendant on said date to operate certain machines in defendant's said factory; that it was no part of the duty of the appellee to keep the machines safe and in repair; that the machines were constructed in the manner described in the complaint for the purpose of cutting excelsior, or wood hair, and consisted, partly, of a knife moving rapidly up and down, fastened to an iron plate by set-screws; that the defendant negligently permitted the screws, nuts, and bolts which fastened the steel blade in its place to become

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worn, defective, and loose, so that the motion of said machine caused said blade to become loose,—of all of which the appellee had no knowledge, but which was known to the defendants long enough before the accident to appellee to enable them to repair the same; that while the appellee was working at and using the said machine, the said blade, by reason of the loosening of the screws, nuts, etc., slipped through said plate about three inches, and, without fault or negligence on the part of the appellee, severed his hand from the arm a little below the wrist joint, etc. The answer was a denial, and the cause was submitted to a jury. Upon the trial the plaintiff below dismissed the action as to the Indianapolis Excelsior Manufacturing Company, and a verdict was returned against the defendant Johnson, with answers to interrogatories submitted by the parties. The defendant below moved for judgment in his favor on the interrogatories.

The following were some of the questions of fact with the answers to the same: "53. Was it not the duty of Frank Clark, as foreman, to keep defendants' excelsior machines in order and sharpened, and set the knives or bits? A. Yes." "59. Were not the threads in the plate of defendant's excelsior machine, into which the set-screws were fastened, worn out and smooth at the time the plaintiff was injured, and for several months prior? A. They were considerably worn." "61. Could not Frank Clark have discovered by ordinary care and observation, long before the happening of this accident, that from the condition of the threads in said plate, the said set-screws were liable to work loose at any time? A. Yes. 62. Did not the bit or knife in said excelsior machine slip out and cut off defendant's [plaintiff's] hand? A. Yes. 63. Did not said bit or knife slip out on account of the worn and defective condition of the attachments which held said knife in place? A. Yes." "66. If said bit slipped down, would it not extend out toward the plaintiff's hand while

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placing wood in the ordinary manner between the rollers in said machine? A. Yes."

These answers, which are plain and bear directly upon the main issue in the case, are consistent with each other, and fully sustain the general verdict in favor of the appellee. Whether the appellee was injured by reason of a defect in the machinery; whether that defect was known to the appellant, and might have been repaired before the accident; whether the appellee had knowledge of the defect before the accident; whether he was injured without fault on his part,—were questions of fact, all of which were found by the jury in favor of the appellee.

It is insisted by counsel for the appellant that the answers of the jury to the questions of fact indicate that the appellant Johnson was merely the manager of the business of the Indianapolis Excelsior Manufacturing Company, or the owner of its stock. We fail to find anything in the answers to sustain this proposition. The complaint alleged that Johnson was the proprietor of the business carried on at the works of the company, and that he was also the manager of that business. It further stated that the plaintiff was employed by the defendant. As the evidence is not in the record, it is impossible for us to say what proof was made concerning the connection of the appellant Johnson with the works of the Indianapolis Excelsior Manufacturing Company, the nature or extent of his control of the business, or out of what arrangement with that company his liability for the injury to the plaintiff may have arisen. It was possible that he should operate the works at his own expense, for his own profit, and at his own risk, and that he should assume the responsibility for injuries to employees. Nothing in the answers to interrogatories excludes the possibility that such proof was made. The averments of the complaint touching Johnson's relation to the business were ambiguous and indefinite, but they were sufficient, as we think, to admit evidence of the fact that Johnson was oper-

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ating them on his own account, and not as the representative of the corporation.

Many of the answers of the jury to interrogatories tend to sustain the theory of the appellant that the accident happened in such a way and from such a cause that the appellant was not legally responsible for it. But the jury had that theory before them, as well as the theory of the appellee. It was directly brought to their attention by very pointed instructions of the court. They rejected it, and adopted the contrary theory. We can not say that they erred in this. No answer to any interrogatory is of such a nature that it necessarily and inevitably overthrows the general verdict. While those answers, which are particularly discussed by counsel for appellant, furnish material for a strong argument in support of appellant's views of the case, they are not of such controlling character as to justify the court in setting aside the general verdict.

The rules by which we are governed in determining this question are clearly stated in *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 300, 301: "The general verdict necessarily determines all material issues in favor of appellee, and, unless the answers of the jury to the interrogatories are in irreconcilable conflict with the general verdict, the court did not err in overruling appellants' motion for a judgment in their favor. If such irreconcilable conflict exists, then the court erred in overruling said motion. *Ohio, etc., R. Co. v. Trowbridge*, 126 Ind. 391, 393, 394, and cases cited; *Town of Poseyville v. Lewis*, 126 Ind. 80, and cases cited; *Rogers v. Leyden*, 127 Ind. 50, 59, and cases cited; *Graham v. Payne*, 122 Ind. 403, 408, 409; *Indianapolis, etc., R. Co. v. Lewis*, 119 Ind. 218, 223. * * * The answers to the interrogatories can not be aided by any presumptions, for the rule is that all reasonable presumptions will be indulged in favor of the general verdict, and none will be indulged in favor of the answers to the interrogatories. *Town of Poseyville v. Lewis, supra*;

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Ohio, etc., R. Co. v. Trowbridge, supra. The special findings override the general verdict only when both can not stand; the conflict being such, upon the face of the record, as to be beyond the possibility of being removed by any evidence admissible under the issues in the cause. *Amidon v. Gaff*, 24 Ind. 128; *Indianapolis, etc., R. Co. v. Lewis*, 119 Ind. 219, 223." See, also, *McCoy v. Kokomo R., etc., Co.*, 158 Ind. 662. We find no error, therefore, in the refusal of the court to render judgment for the appellant upon the answers to the interrogatories.

Under the assignment that the court erred in overruling the motion for a new trial, various questions as to the correctness of instructions given, or refused, are properly presented. The objection taken to the sixth instruction is that in its enumeration of the facts essential to a recovery, which the plaintiff must prove, it omits the element of want of knowledge by the plaintiff of the defect in the machine which caused the injury. The instruction, however, does not seem to be wanting in this particular. It was as follows: "6. Before the plaintiff can recover in this action, he must establish three things by a fair preponderance of the evidence: First, that he received injuries *as alleged in the complaint*; second, that the injuries complained of were the immediate and proximate result of the defendant's carelessness and negligence as alleged in the complaint; third, that the plaintiff was free from any carelessness or negligence proximately contributing to such injuries."

By this instruction the jury were told that the plaintiff must prove "that he received injuries as stated in the complaint." It was stated in the complaint that the plaintiff had no knowledge of the defective condition of the machine, and that he was injured while working with it. If he was injured with knowledge of the dangerous condition of the machine, then he did not receive the injuries *as stated in the complaint*. The instruction was not as full and plain upon the fact of knowledge as it might have been, but, if thought

objectionable on that account, the rule of law contended for by the appellant could have been stated more fully by a further instruction tendered by the defendant. Besides, by several other instructions, and especially by the seventeenth, the jury were informed that they could not return a verdict for the plaintiff unless they found that he "did not know of such dangerous and defective condition of said machine, and could not, by the exercise of reasonable care and diligence while operating said machine, in the usual and ordinary manner, have discovered said defective and dangerous condition." The instruction stated no false or erroneous principle of law. It is impeached only on the ground that it did not go far enough. This being so, its omissions could be, and appear to have been, sufficiently supplied by the seventeenth instruction.

Instruction number eight is complained of for the reason that it told the jury "that it is the absolute duty of the employer to provide his employe with reasonably safe appliances and machines with which to do his work, when it should have said that the employer *should exercise reasonable care* to provide such machinery." But the instruction expressly states that "if an employe sustains injury in consequence of the failure or neglect of an employer *to use reasonable care and diligence*" to discharge the duty of providing safe machinery, and keeping it in repair, then the employe, if injured without his fault, etc., would be entitled to recover. Neither is the instruction objectionable because it fails to point out the distinction between contributory negligence and assumption of risk. This instruction did not relate to that subject. Other instructions made that distinction clear.

The tenth instruction stated certain conditions under which a plaintiff could not recover for a personal injury. The fact that it did not state other conditions under which no recovery could be had did not render it objectionable.

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The twelfth instruction is assailed upon the ground that it was not authorized by the allegations of the complaint, and for that reason was misleading, and gave the jury a wider latitude than was permissible under those allegations. The objection is thus stated: "This is an instruction in which the theory of the plaintiff's case is again stated. At the top of page 41, in summarizing the complaint, the court tells the jury that it is alleged that the defendant knew, or *ought to have known*, of the defective condition of the machine. The latter part of this statement is untrue. The allegation of the complaint is that defendant knew of the defective condition. There is no suggestion in it that he ought to have known. In other words, it is a complaint charging actual knowledge, and not constructive knowledge. By this instruction the jury were told that the complaint was that the defendant ought to have known of the defective condition of the machine. * * * It authorized a recovery upon a state of facts not alleged in the complaint, and no authorities need be cited to show that such an instruction was erroneous." The averment of the complaint on the subject of notice is that "defendant had knowledge that said blade and attachments were out of repair, and defective and dangerous, and had such knowledge long enough to repair the same in the exercise of reasonable care." An allegation of knowledge or notice includes not only actual knowledge or notice, but implied or constructive notice; and proof either of actual knowledge, or that the defendant, by the exercise of ordinary care, might have obtained such knowledge, is admissible under the general allegation of knowledge or notice. In view of the authorities, the averment that a defendant might have obtained knowledge of the situation by the exercise of reasonable or ordinary care, seems unnecessary. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 300; *Evansville, etc., R. Co. v. Duel*, 184 Ind. 156, 160; *Hunt v. City of Dubuque*, 96 Iowa 314, 65 N. W. 319; *City of Ft. Wayne v. Patterson*,

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3 Ind. App. 34. The instruction did not go beyond the complaint, nor authorize the jury to consider any evidence not properly admissible under its allegations.

The question of the correctness of the refusal of the court to give the eighth instruction asked for by the defendant can not be considered, for the reason that it relates to the evidence in the case, and this, as we have seen, is not in the record.

Finding no error, the judgment is affirmed.

HARNESS v. STEELE, BY NEXT FRIEND.

[No. 19,848. Filed October 10, 1902.]

FALSE IMPRISONMENT.—Complaint.—A complaint in an action for false imprisonment setting forth that "defendant unlawfully imprisoned the plaintiff and deprived him of his liberty for the space of one hour," etc., is not demurrable on the ground that it pleads a conclusion. pp. 287, 288.

SAME.—Complaint.—A complaint for false imprisonment is sufficient without alleging that the act complained of was illegal or wrongful, or that the arrest or imprisonment was without competent authority, or malicious, or without probable cause. p. 288.

PLEADING.—Argumentative Denial.—Harmless Error.—Sustaining a demurrer to an argumentative denial is harmless error where the general denial was pleaded in another paragraph. pp. 288, 289.

INSTRUCTION.—When Incomplete.—Where an instruction is correct as far as it goes, but incomplete, it may be completed by another which supplies the defects. p. 293.

FALSE IMPRISONMENT.—Arrest Without Warrant.—Unlawful Detention.—Liability of Officer.—Where a person arrested without a warrant is held by an officer for a longer period of time than is required, under the circumstances, without such warrant, he will have a cause of action for false imprisonment against the officer and all others by whom he has been unlawfully detained. p. 295.

SAME.—Unlawful Detention of Accused by Officer.—An officer arresting without a warrant cannot justify his action in detaining a prisoner for an unreasonable time before obtaining a warrant, upon the ground that such delay was necessary in order to investigate the case and procure evidence against the accused. p. 296.

TRIAL.—Instructions.—Measure of Damages.—Two Defendants.—In an action against two defendants the failure of the court to instruct as to the measure of damages except in the event they found against

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one certain defendant, is not reversible error, where the court further instructed the jury that they might find against both defendants, or in favor of either and against the other. pp. 296, 297.

FALSE IMPRISONMENT.—*Damages.*—Wounded pride, humiliation, and mortification resulting from a public arrest are proper elements to be taken into consideration in assessing damages in an action for false imprisonment. p. 299.

SAME.—*Exemplary Damages.*—*Malice.*—Where in an action for false imprisonment the evidence discloses that the plaintiff was a boy fourteen years old, and was accused by defendant in the presence of others of being a thief, and upon denial plaintiff was called a liar, the jury may assess exemplary damages, although no malice on the part of the defendant is shown. pp. 299, 300.

From Howard Superior Court; *Hiram Brownlee*, Judge.

Action by Arthur Steele against Lewis W. Harness and another for false imprisonment. From a judgment for plaintiff, defendant Harness appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

B. F. Harness, W. R. Voorhis, Milton Bell and W. C. Purdum, for appellant.

J. C. Blackledge, C. C. Shirley and Conrad Wolf, for appellee.

JORDAN, J.—Appellee, a minor, by his next friend, sued appellant, the sheriff of Howard county, together with one Strubbs, to recover damages for false imprisonment. A trial before a jury resulted in a verdict against appellant for \$400, and a finding in favor of the defendant Strubbs. Over appellant's motion for a new trial, wherein he assigns various reasons, the court rendered judgment on the verdict, from which appellant appealed to the Appellate Court.

The first error argued by counsel for appellant is the overruling of the demurrer to the first paragraph of the amended complaint. This complaint consists of two paragraphs, the first, omitting the caption, is as follows: "Plaintiff, for his amended complaint, complains of the defendants, and says that on the 15th day of May, 1900, the defendants unlawfully imprisoned the plaintiff and deprived him of his liberty for the space of one hour, to his

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damage in the sum of \$2,000, for which he demands judgment."

It is contended that this paragraph contains no facts to show that appellee was falsely imprisoned and deprived of his liberty, but consists merely of conclusions. While the paragraph is somewhat terse it is an exact copy of the form given in 3 Works Prac. (3d ed.), 152. It may also be said that it substantially follows the averments in a form given in 1 Estee's Pl. & Pr. (4th ed.), 839, with the exception that the latter form does not contain the word "unlawful," and states that the imprisonment was "without probable cause," and also gives the place at which the plaintiff was imprisoned. The charge that "the defendants * * * imprisoned the plaintiff and deprived him of his liberty for the space of one hour" is certainly not a mere conclusion of the pleader, but is a composite statement of the ultimate fact,—the imprisonment of the plaintiff. The word "unlawful" is not essential and may be omitted from the pleading, for the rule is settled in this State that a complaint for false imprisonment is sufficient without alleging that the act complained of was illegal or wrongful, or that the arrest or imprisonment was without competent authority, or malicious, or without probable cause. *Colter v. Lower*, 35 Ind. 285, 9 Am. Rep. 735; *Gallimore v. Ammerman*, 39 Ind. 323; *Boaz v. Tate*, 43 Ind. 60. The paragraph in controversy is at least sufficient on demurrer. It might possibly have been open to the objection, upon a motion to make it more specific, that it did not state the venue where the alleged wrong was perpetrated by the defendants; but in respect to this question we do not decide.

The appellant answered in three paragraphs, the first being a general denial. A demurrer was sustained to the second, and of this ruling appellant complains. The paragraph was not one in confession and avoidance. It professed, in part at least, to recite the circumstances surrounding the alleged arrest and imprisonment, but expressly

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averred that the defendant at no time or place arrested the plaintiff, and at no time deprived him of his liberty. If the paragraph, under its recitals and averments, can, on any view, be sustained as an answer, it must be upon the ground that it serves as a special denial. All of the facts, however, therein averred, so far as competent to constitute in any manner a defense to the action, were admissible under the general denial, which remained as a part of the answer; consequently it was not necessary to plead them affirmatively, and the ruling in sustaining the demurrer to the paragraph, under the circumstances, was harmless. *Jeffersonville Water, etc., Co. v. Riter*, 146 Ind. 521.

There is a sharp conflict in the evidence in regard to some material points; nevertheless there is evidence to establish the following summary of facts: On May 14, 1900, E. H. Strubbs, appellant's codefendant below, was carrying on a harness shop in the city of Kokomo, Howard county, Indiana. On that day a watch was stolen from his shop, and thereupon he made complaint to appellant, who was the sheriff of said county, and informed him that appellee frequently visited his harness shop, and stated to appellant that he thought appellee had taken the watch as he had been at his place of business on the morning of the 14th, and that appellee knew that he (Strubbs) had the watch, because he had often looked at it when at the harness shop. Appellee was a boy about fourteen years of age, an orphan, residing in the family of one McBeth, in the city of Kokomo. He was a musician, and his standing in the community was good, and he was just beginning to rely for his support on teaching music. Appellant, on receiving the information mentioned, and after talking the matter over with Strubbs, proceeded, on the forenoon of May 15th, to hunt for appellee. After inquiring at several places for him, he finally found him at the home of one Stewart, in said city, and called him out of the house, and then and

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there informed him that he was the sheriff of the county, and had come to arrest him. Appellee inquired for what he was to be arrested, and was informed by appellant that he (appellee) knew what he had taken. Appellee denied that he had taken anything, and thereupon appellant informed him that a watch had been taken from Strubbs' harness shop, and that he (appellee) knew he had taken it. Appellee replied that he knew nothing about the watch being taken; that he had no need for the watch as he had one of his own, which he took out and exhibited to appellant. Thereupon the latter took the watch away from him and put it in his pocket, and stated to appellee to get his hat and come with him. Upon being ordered to get his hat and go with appellant, appellee became excited and frightened, but did as he was bidden, and went along with appellant; the latter informing him that he wanted him to go with him to Strubbs' shop. They went together north along Main street, in the city of Kokomo, until they came opposite the county jail, and then appellant took appellee across the street to the jail building. Appellant then again said to him: "You don't know nothing about the watch?" and he replied that he did not. Thereupon appellant said to him: "If I have to lock you up you will be in here for six weeks. I don't like to do a young man like this. If you don't own up I will have to turn the keys. If I once turn the keys on you, you will be in here for six weeks." Appellant denied this conversation, but admitted that he took appellee across the street to the jail, but gave as an excuse for so doing that he wanted to ascertain if his dinner was ready, it being then about eleven o'clock. After leaving the jail building, appellee was taken by appellant to Strubbs' harness shop. In going to the shop they went along Main street past the offices of two justices of the peace, and also passed along near the vicinity of the mayor's office, but no offer or attempt was made to take him before either of the magistrates or the mayor. On the way to Strubbs' shop

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they went along and through the principal parts of the city, and passed and repassed a great many persons, and finally arrived at the harness shop.

Appellee testified that when they reached the shop both Strubbs and appellant accused him of having taken the watch; Strubbs saying to him: "You know you took the watch and you ought to tell where it is. I hate to have a boy up this way;" and further accused him of having taken a match-safe,—all of which he denied. Appellee testified that when at the shop Strubbs and appellant told him that a prominent man passed the window of the shop at the time the watch was taken, and saw appellee take it. Appellant and Strubbs, at the latter's shop, had a conversation in a whisper with each other, after which appellant directed appellee to come along with him. They went together down along Washington, Main, and Walnut streets until they again reached the county jail, appellant continuing to say to appellee that if he did not tell where the watch was he would have to put him in jail, and, if he once put him in jail, he would be there for six weeks; and further said to him, "I don't like to turn the key on a boy." Appellee continued to deny that he had taken the watch, or that he knew where it was, and thereupon appellant told him he was "lying." After they had reached the jail the second time, appellant took appellee into the jail office, and then directed a young man who was present there to get him the key to the door opening into the cell rooms of the jail. He then unlocked and opened the iron door leading to the cells, and then said to appellee: "Now what have you got to say? Back there is your cell." Upon hearing appellant make this statement, appellee became frightened, and began to cry, but continued to assert his innocence. Appellant was informed at the jail that some friend of appellee had been there to see him. After he received this information, he told appellee he might go back to Stewart's house,—that being the place where he was when appellant found him,—

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saying to him: "You stay there until this evening, and I will come after you. Don't you go away at all." After appellant let appellee go, he continued crying until he reached the home of Mr. Stewart. He informed Mr. Stewart of his arrest, and the latter went to the jail, and saw appellant in regard to the trouble. Stewart testified on the trial that appellant told him that appellee had been accused of stealing a watch, and that he had arrested him and taken him to the jail, but did not put him in the prison. He informed this witness that he had no warrant for the arrest of appellee, but, as sheriff, he had the right to arrest a person on information without any warrant being issued. He admitted to this witness that he had taken appellee to the jail, and had opened the cell door, and told him if he did not confess he would put him in the jail. In the same conversation he told the witness that he did not believe that appellee was guilty, but, as an excuse for taking him to the jail and threatening to imprison him therein, he stated that he did so because it was the practice of sheriffs and other officers to do so in order to extort a confession of the truth from an accused person. After going to Stewart's, as directed by appellant, appellee remained there until the next morning; but appellant did not come for him, and he was not again arrested, and nothing further was done in the matter. The fact that appellant had no warrant for the arrest of appellee, and made no attempt to take him before a justice of the peace, or some other judicial officer, is undisputed.

Under the alleged error of overruling the motion for a new trial, appellant, by his counsel, insists that instruction number two is faulty, basing his objection apparently on the ground that it is not applicable to the evidence. In their contention, however, counsel seemingly disregard the evidence given on the part of appellee. When all of the evidence given in the case is considered, as it must be, it is

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manifest that the contention in regard to the charge in question is not sustained.

Complaint is also made in respect to instruction number four. By this charge the court advised the jury that the general rule of the law is that no person shall be deprived of his liberty except he first be charged by affidavit or indictment with the commission of an offense, such charge being followed by a warrant duly issued and placed in the hands of an officer authorized to serve such process. The instruction, however, further states that to this general rule there are certain exceptions made necessary by the needs of society; but the exceptions are not given in this particular charge. The objections urged are that the court erred in not informing the jury in the same instruction in regard to the exceptions in question. The court, however, by instruction number six, fully advised them in respect to the exceptions to the general rule asserted in instruction number four. Possibly it might have been more orderly to have stated in the charge the exceptions to the rule so far as they were applicable to the case at bar; but the practice in this State is well settled that where an instruction is correct so far as it goes, but incomplete, it may be completed by another which supplies the defects. On any view of the question, as the exceptions were given in instruction six, appellant, under the circumstances, has no basis for his complaint.

By instruction number seven the court said: "It is the duty of a sheriff arresting a person without a warrant for an offense committed within his view, or when he arrests a person without a warrant upon information, when he has reasonable or probable cause to believe that such person has committed a felony, in either case without delay, and as soon as he can reasonably do so, to take the person whom he has placed under arrest before some magistrate, to be charged with such offense by affidavit. Such an arrest can only be made and the person held for such purpose. If the

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officer shall fail to take the person so arrested before a magistrate as required by law, then he is liable to such person in an action for damages." By instruction eight, the jury was further advised that a sheriff of a county is a peace officer, and, as such, he may arrest without a warrant upon information and reasonable or probable cause for belief, but such sheriff is not an examining officer charged with the duty of inquiring as to the guilt or innocence of the party charged. The instruction in substance further stated that the duty of examining into the alleged offense rested on the magistrate before whom the accused person was taken; the court again asserting in this charge, as it had previously done, that it was the duty of the officer making the arrest to take the accused person before a magistrate for presentment and examination in regard to the charge made; that, although the arrest was rightfully made in the first instance, nevertheless if the officer failed to take such person before a magistrate, as required by law, he would be liable in an action for damages.

Appellant's insistence is that instructions seven and eight did not state the law correctly, for the reason, as contended, that a peace officer, on making an arrest without a warrant, is not required, under the law, to take his prisoner before a justice of the peace, or any other committing officer, for the purpose of having the party so arrested charged by affidavit. It is contended that the officer on learning that the accused is probably not guilty of the offense may discharge him. The insistence is that the charge in question is not a correct exposition of the law, because this latter statement is omitted. It is true that an officer who has made an arrest without a warrant may and should, on becoming satisfied thereafter that the accused is not guilty of the offense, release him; but, if either the arrest was unlawful, or the prisoner has been illegally detained or deprived of his liberty by the officer before such release or discharge takes place, the mere fact that the officer released

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the person arrested under such circumstances will not relieve him of an action at the instance of the injured party. Upon any view of the case, the instructions were a correct statement of general principles of law applicable to the evidence, at least so far as they related to an offense of the degree of felony; and, if appellant considered that he was entitled to have the jury advised, as he contends, he ought to have requested a special instruction for that purpose. By the rules of the common law a peace officer where he had reasonable or probable cause to believe that a felony had been committed, might arrest the accused person without a warrant; and for making such an arrest he was justified, although subsequently it appeared that the party was not guilty of committing the offense. *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669, and authorities cited; *Simmons v. Vandyke*, 138 Ind. 380, 26 L. R. A. 33, 46 Am. St. 411; *Palmer v. Maine Cent. R. Co.*, 92 Me. 399, 42 Atl. 800, 44 L. R. A. 673, 69 Am. St. 513, and cases cited.

But the power of detaining the person so arrested, or restraining him of his liberty, in such a case is not a matter within the discretion of the officer making the arrest. He can not legally hold the person arrested in custody for a longer period of time than is reasonably necessary, under all of the circumstances of the case, to obtain a proper warrant or order for his further detention from some tribunal or officer authorized under the law to issue such a warrant or order. If the person arrested is detained or held by the officer for a longer period of time than is required under the circumstances, without such warrant or authority, he will have a cause of action for false imprisonment against the officer and all others by whom he has been unlawfully detained or held. *Simmons v. Vandyke*, *supra*; *Low v. Evans*, 16 Ind. 486; 12 Am. & Eng. Ency. Law (2d ed.), 741, 746, 747; *Leger v. Warren*, 62 Ohio St. 500, 57 N. E. 506, 51 L. R. A. 193, 78 Am. St. 738; *Brock v. Stim-*

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son, 108 Mass. 520, 11 Am. Rep. 390; *Green v. Kennedy*, 48 N. Y. 653; *Tubbs v. Tukey*, 3 Cush. 438, 50 Am. Dec. 744.

An officer arresting without a warrant can not justify his action in holding or detaining the prisoner for an unreasonable time before obtaining a warrant upon the ground that such delay was necessary in order to investigate the case and procure evidence against the accused. A detention for such a purpose, if necessary, is properly within the jurisdiction of the justice of the peace or other judicial officer before whom he may be charged with committing the offense. Under §1771 Burns 1901, a sheriff is authorized to arrest without a warrant any person whom he may find violating any of the penal laws of this State. But the statute is careful to provide that the detention of the person so arrested is to continue only until a legal warrant can be obtained. This section is applicable to offenses, either felonies or misdemeanors, committed in the presence or under the observation of the persons authorized thereunder to make the arrest; and, so far as it applies to sheriffs and others therein mentioned, who were peace officers at common law, it is but a declaration or recognition of the rule asserted by the latter law, as thereunder it was the duty of peace officers to arrest without a warrant any person who committed an offense, either felony or misdemeanor, in their presence or within their view.

While instructions seven and eight are not as aptly and as clearly drafted as they might have been, nevertheless, when considered in connection with others given, they are in harmony with the principles of the law to which we have referred, and are applicable to the evidence in this case. The court committed no error in giving them to the jury.

It is next insisted that instructions fourteen and fifteen are misleading and prejudicial to appellant. It is claimed that an infirmity exists in the former because it advises the jury as to the measure of damages in the event they find

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against appellant. As there were two defendants in the action it is urged that the jury must have understood thereby that they would not be justified in finding in favor of appellant. The fault imputed to the latter instruction is that it informed the jury how to formulate their verdict in the event they found against appellant, but is silent as to their finding against his codefendant; hence it is asserted that the jurors were, in effect, given to understand that they could not, under the evidence, find in favor of appellant unless they found in favor of both defendants. In the fifteenth instruction the court stated to the jury that in the event they found in favor of both defendants, the form of their verdict would be, "We, the jury, find for the defendants." Instruction eleven stated that, in case the evidence warranted, the jury could find against both the defendants, or in favor of one and against the other. Under the circumstances appellant's objection to these instructions are certainly untenable, and without merit. If he desired the jury to be more fully advised in regard to their findings or forms of verdict, he should have presented a special instruction to be given by the court in respect to that matter.

It is finally contended that the judgment should be reversed because it is not sustained by sufficient evidence, and for the further reason that the damages are excessive. The contention is that the evidence discloses that appellant had no intention of arresting or detaining the appellee, and the argument is seemingly carried to the extent of asserting that the appellee was not restrained of his liberty. In their argument on this question appellant's counsel seem wholly to disregard the evidence given in behalf of the appellee, and virtually request that we consider alone that introduced on the part of their client. Appellant's own admissions, which were introduced against him in evidence at the trial, go to show that he considered that he had appellee under arrest and in his custody, and was detaining

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him until he could investigate as to his guilt, or, rather, until he could extort from him a confession.

As we have previously said, the evidence is, in some respects, conflicting, but it is ample to sustain the verdict of the jury on every material point. Appellant, as disclosed by the evidence, went to the home of Mr. Stewart, where appellee was visiting at the time. He called him out of the house onto the porch, and informed him that he was the sheriff of the county, and had come to arrest him. Upon appellee inquiring as to the reason for his arrest, he accused him with the larceny of the watch. This accusation appellee denied. Appellant, it seems, dispossessed appellee of his watch, and then bid him come with him. He obeyed this command and was taken down the public streets of the city of Kokomo until the county jail was reached. He was then taken by appellant from the jail along the public streets of that city until the harness shop of Mr. Strubbs was reached, and was there detained for a time, and threatened with imprisonment if he did not confess that he was guilty of the larceny. After the lapse of some time he was taken back to the jail by appellant, into the interior of the prison, and was shown a cell in which, as appellant informed him, he would be locked, unless he admitted that he had stolen the watch; and when he continued to assert his innocence appellant called him a liar. After a time he was commanded by appellant to go back to Mr. Stewart's place, at which he was arrested, and was commanded to remain there until the evening of that day, when appellant stated he would call for him. Ample time and opportunity, under the circumstances, were afforded appellant to have proceeded in the arrest of appellee in an orderly way by taking him before a justice of the peace or the mayor of the city for the purpose of being charged with the alleged crime. This he failed and neglected to do.

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There is evidence to show that appellant's purpose in detaining appellee and threatening to lock him up as he did, was to extort a confession from him in respect to the larceny. It can not be successfully controverted, under the evidence, but what appellee is shown to have been placed under arrest by appellant, and subjected to his commands and movements during all the time he had him in charge. He was not permitted to go or move at his own free will or volition, for it is evident that whatever consent he may have given to go with appellant was enforced by the latter. If the jury believed the testimony of appellee and the witnesses who testified in his behalf, they were fully warranted in assessing the damages which they did.

Wounded pride, humiliation, and mortification resulting from a public arrest are proper elements that may be taken into consideration in assessing damages in cases of this character. The spirit and conduct of appellant at the time he made the arrest were matters that the jury, under the evidence, had the right to, and doubtless did, inquire into, and gave the same consideration. They probably found, as there is evidence to justify such finding, that there were unwarranted insults offered to appellee on the part of appellant; also oppression on his part, and a reckless disregard, under the circumstances, of appellee's rights as a citizen. Appellee, as the evidence discloses, was subjected to repeated "quizzing," and was virtually branded by appellant, in the presence of others, as a thief; and when he, a mere boy, protested his innocence in regard to the charge, appellant called him a liar. Under these circumstances the jury may, and possibly did, inflict "smart money" or exemplary damages, as jurors have the right to do in cases of false imprisonment when the facts justify. *Farman v. Lauman*, 73 Ind. 568. Such damages do not necessarily, as claimed by counsel for appellant, depend alone upon malice on the part of the wrongdoer, but they may be rightfully awarded when the wrongful act is wilfully done in a

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wanton or oppressive manner, or done in the reckless disregard of the rights of the complaining party. This court, upon a charge of excessive damages, will not interfere with the verdict of the jury, unless the damages assessed are so large as to induce the belief that they resulted from passion or prejudice, and are not the result of the jurors' deliberate judgment upon the evidence.

The act and conduct of appellant in threatening appellee with imprisonment in jail, and in subjecting him to what is commonly known as the "sweating process," for the purpose of extorting a confession, certainly can not be commended, and under the circumstances we consider that the jury was very moderate in the assessment of damages.

The record presents no available error. Judgment affirmed.

THE CITY OF TERRE HAUTE v. KERSEY ET AL.

[No. 19,085. Filed June 6, 1902. Rehearing denied October 10, 1902.]

MUNICIPAL CORPORATIONS.—Vehicle License.—Taxation.—A city ordinance imposing a tax for the use of streets by vehicles is not a tax on the vehicles as articles of property, but the effect thereof is to subject the owners of the vehicles to the payment of a tax for a license or privilege of using such vehicles upon the public streets of the city. *p. 306.*

SAME.—Vehicle License.—Taxation.—Police Power.—The adoption of an ordinance fixing a license upon vehicles used upon the streets of a city which neither professes nor is intended in any manner to regulate or restrict the use of vehicles, but the primary purpose of which is to impose a license tax as a revenue for the maintenance and repair of the streets, is not the exercise of a police power. *pp. 306, 307.*

SAME.—Vehicle License.—Taxation.—The authority of a city to enforce a vehicle license for the purpose of creating revenue for the maintenance and repair of streets must be conferred by statute, and such power must be strictly construed. *p. 307.*

SAME.—Vehicle License.—Taxation.—Constitutional Law.—Section 1, article 10, of the State Constitution, which provides for a uniform and equal rate of assessment and taxation relates to a general assessment of taxes on property according to its value, and does

159	300
159	328
159	300
161	471
161	472
161	473
161	477
159	300
168	199

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not apply to a tax for a license to use vehicles upon the streets of a city. p. 309.

MUNICIPAL CORPORATIONS.—Vehicle License.—Taxation.—A city governed by the general laws of this State relating to the organization of cities, and conferring upon common councils thereof certain enumerated powers (§§3541, 3541a, 3617, 3623 Burns 1901), has power to impose a tax for a license to use vehicles upon its streets, including private vehicles, for the purpose of creating a revenue for the maintenance and repair of the streets. pp. 307-312.

SAME.—Vehicle License.—Classification.—An ordinance imposing a tax for a license to use vehicles upon the streets of a city is properly based upon the use to which such vehicles are devoted rather than the value of the vehicles. p. 312.

From Vigo Superior Court; *S. M. McGregor*, Special Judge.

Suit by William P. Kersey and others to enjoin the city of Terre Haute from enforcing an ordinance imposing a tax for vehicle license. From a judgment for plaintiffs, defendant appeals. *Reversed.*

P. M. Foley, for appellant.

J. S. Jordan, *R. B. Stimson* and *H. A. Condit*, for appellees.

JORDAN, J.—This appeal brings before us for review an ordinance adopted, and caused to be published, by the common council of the city of Terre Haute, Indiana, on January 7, 1899, imposing a license tax to be paid by the owners of certain vehicles used on the public streets of said city. The action was instituted in the lower court by William P. Kersey, in conjunction with his co-appellees herein, six in number, suing for themselves and in behalf of 5,000 others similarly situated, to enjoin appellant from enforcing against them the ordinance in controversy, for the reason that the same was wholly void, at least so far as the same concerned them. The complaint alleges and discloses that appellees are citizens of the United States, and taxpayers residing within the city of Terre Haute, and are the owners of various kinds of vehicles kept by them for their own use, health, pleasure, and profit, and not for the purpose of

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carrying goods, passengers for hire, or for the purpose of renting the same, but that such vehicles are kept for their own private use; that all of said vehicles owned by them on April 1, 1898, had been duly listed and assessed for taxation under the general revenue laws of the State of Indiana. It is alleged that the use of the vehicles owned by appellees is necessary to their health and business, and that it is impossible to use them without entering upon and driving along and over the streets of said city; that the value of said vehicles varies from fifty cents to \$500. It is charged that the ordinance in question is not uniform in its operation upon all persons in the same class, and that certain kinds of vehicles used upon the streets of the city are exempted from its operation, and that the ordinance is designed as a revenue measure, and would produce, if enforced, a revenue of \$15,000; that it is not intended to correct any evil or abuse, or to preserve the peace, good order, or safety of society, or any part thereof. For these reasons, and the others hereinafter stated, appellees charge in their complaint (1) that the ordinance is null and void because it deprives them of the free use of their property, and of the free use of the public streets of said city, in contravention of §§1, 21, and 23 of article 1 of the State's Constitution; (2) that it grants privileges and immunities to a class of citizens which it does not grant to appellees on the same terms, and is, therefore, in violation of §23 of said article of the Constitution; (3) that it provides for an unequal and ununiform taxation of property in violation of §1 of article 10 of the Constitution; (4) that it contravenes §1 of the fourteenth amendment of the federal Constitution, inasmuch as it serves to deprive appellees of their property and liberty without due process of law, and deprives them of the equal protection of the law. It is further charged that appellant, by and through its officers, is threatening to enforce the ordinance against appellees, plaintiffs below, by arresting and prosecuting them and

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enforcing fines against them for the violation of said ordinance, etc.

A perpetual injunction is demanded against appellant and its officers to prevent them from attempting to enforce said ordinance. The trial court held the complaint sufficient on demurrer. Appellant filed its answer in one paragraph wherein it set out all of the ordinances of the city of Terre Haute which regulated the use of its streets and the use of vehicles thereon. It also set out all of the police regulations in regard to the streets and vehicles, and further averred that said city had ninety miles of improved streets, and if all persons liable under the ordinance were required to take out a license, the amount realized thereby would not exceed \$8,000 per annum; that to keep the streets in a good and safe condition for travel thereon, appellant was required to expend annually more than \$40,000. The answer further discloses that the city of Terre Haute has a population of 45,000, and has 133 miles of streets within its corporate limits. A demurrer was sustained to this answer, and, appellant refusing to plead further, the court rendered its judgment enjoining it from enforcing said ordinance against appellees, and from enforcing it against any and all persons similarly situated. Errors are assigned on these rulings of the court.

The ordinance in controversy is entitled "An ordinance providing for a license upon vehicles drawn upon the streets of the city of Terre Haute, Indiana, providing penalties for the enforcement of the same," and is as follows: "Be it ordained by the common council of the city of Terre Haute, Indiana:

"Section 1. That the owner of all vehicles used on the streets of the city of Terre Haute shall pay annually license fees as follows, viz.: 1. On each wagon or truck used for hauling boilers, engines, machinery, or safes, and drawn by four horses, \$4. 2. On each wagon or truck used as above and drawn by two horses, \$2. 3. On each wagon or truck

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used for hauling brick, ice, coal, drawn by two horses, \$2. 4. On each omnibus or tally-ho drawn by two horses, \$2. 5. On each wagon drawn by four horses, and not used in the manner specified in clause one, \$3. 6. On each wagon, cart, dray, truck, furniture car, delivery wagon, or sprinkling cart drawn by two horses or less, \$2. 7. On each buggy, surrey, coupe, or sulky used for pleasure and drawn by one horse, \$1. 9. On each hack, hackney, carriage, cab, barouche, buggy, driving car, surrey and all vehicles drawn by two horses, \$2. 10. On each bicycle or tricycle, \$1. 11. On each vehicle drawn by one horse not before mentioned, \$1. 12. On each two-horse vehicle not before mentioned, \$2. 13. On each three-horse vehicle not before mentioned, \$3. 14. On each four-horse vehicle not before mentioned, \$4.

“Section 2. All vehicles used by persons living without said city in hauling ice, coal, brick, sewer-pipe, tiling, or in the peddling of milk over and upon the streets of the city of Terre Haute, Indiana, the sum of \$2 for each vehicle drawn by one or more horses. Persons who take out license under this ordinance after February 15th of each year shall pay *pro rata* for the balance of the year ending February 15th thereafter: Provided, that every license issued after November 15th of each year, shall be a license fee charged to one-fourth of the annual license fee charged in this ordinance.

“Section 3. That any person included in the provisions of this ordinance desiring to use the streets of said city shall pay, or cause to be paid, to the city treasurer for each vehicle the license fee as herein provided, and take his receipt therefor, and upon presentation of said receipt to the city clerk, the said city clerk shall issue a license to the owner of said vehicle. It shall be unlawful for any person or persons owning any vehicle included in the provisions of this ordinance to use the streets of said city without first securing a license as herein provided.”

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Section four provides that there shall be "kept conspicuously in view on each vehicle mentioned in the ordinance the registered number of such vehicle, so that the same can be easily read from the sidewalk," etc.

"Section 5. The fund derived from the license herein provided for shall be applied only to the maintenance and repair of the streets and alleys of the city of Terre Haute.

"Section 6. The owners of vehicles covered by the terms of this ordinance, shall, before obtaining his license as herein provided, be required to pay to the city of Terre Haute the license fee as required by this ordinance, and take and file the city treasurer's receipt for the same with the city clerk, accompanied by an application signed by himself in which he shall set forth a full description of the kind and character of the vehicle for which a license is desired, the name of the owner, and the use to which such vehicle is to be put. Thereupon said clerk, upon the delivery of such receipt, shall deliver to said owner a license covering the period for which payment has been made, together with the plates provided for in this ordinance. Said clerk shall receive out of said license fee the sum of ten cents for each license issued."

Section seven, among other things, provides for a transfer of the license from the original owner to the purchaser of the vehicle, and for the recording of the license in the record book kept for that purpose.

"Section 8. Any person, firm, or corporation who shall violate any of the provisions of this ordinance, or who shall after the 15th day of February of each year drive or propel or cause to be driven or propelled on any of the streets of the city of Terre Haute, any unlicensed vehicle which under this ordinance requires a license shall be fined in any sum not less than \$1 and not more than \$10."

Section nine declares that the ordinance shall be in full force and effect from and after its passage and publication, and after February 15, 1899.

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It is apparent that this ordinance is not a model, either in the draft thereof, or in the language or terms therein employed, but its intention or purpose is evident; which is, as we interpret it, to subject the owner of the vehicles therein named to the payment of a tax for a license or privilege to use such vehicles upon the public streets of the city. The ordinance in effect, if not in terms, imposes a tax for the use of the city's streets by the means of the vehicles therein mentioned. It is not the vehicles, as articles of property, which are sought to be taxed by virtue of the ordinance, but it is the use thereof on the public streets. This proposition, we think, is made clear by the fact that owners of vehicles might, without violating the ordinance, use them on their own premises or on the premises of their neighbors, or they might each or all manufacture and keep for sale any number of vehicles, without in either case being liable, under the ordinance, to the tax imposed. It is only when they use their vehicles on the streets of the city that they may be subjected to the payment of the annual tax for the privilege of such use. It is apparent that the ordinance neither professes nor is intended in any manner to regulate or restrict the use of vehicles, but the primary purpose thereof is to impose a license tax as revenue for the maintenance and repair of the streets. Therefore, appellant in the adoption thereof, can not be said to have been in the exercise of the police power, for the functions of the latter are not primarily the raising of revenue.

The authorities generally affirm that the power to tax, in a strict and proper sense, for the purpose of creating revenue, is not included within the police power of the State. However, it is true that the exercise of the latter power by a municipality may incidently conduce to create a revenue, and thereby benefit the public treasury. It follows, then, that if the validity of the ordinance can be upheld, it must be upon the ground that the adoption thereof is a legitimate exercise of a special taxing power conferred

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upon it by the legislature. It is true, as a general proposition, that a license is frequently required or exacted under the police power of the State; but a special license tax, as is that in the case at bar, can only be imposed for revenue by virtue of the State's taxing power, and not by reason of the police power. 2 Dillon, Mun. Corp. (4th ed.), §§764, 768. If, however, the power conferred by the legislature upon appellant in the case at bar is not only to license and regulate vehicles, but the express authority is also given to tax them, or, rather, to tax their use, then the question, under the circumstances, as to whether such tax shall be denominated a license tax, or merely a special tax, is wholly immaterial.

The authority of appellant to impose upon and exact of appellees the tax in question must be shown to have been expressly, or by necessary implication, conferred upon it by the legislature, and such power must be strictly construed. This requires an examination of the statutes in respect to the authority conferred by the legislative department upon appellant's common council.

At the time of the adoption of this ordinance the city of Terre Haute was, and had been for many years, an incorporated city under and governed by the general laws of this State relating to the organization of cities, and conferring upon common councils thereof certain enumerated powers. Section 3541 Burns 1901, which in the main enumerates and confers these powers, provides: "The common council shall have power to enforce ordinances. * * * Twelfth, to regulate the use of coaches, hacks, drays and other vehicles for transportation of passengers, freight or other articles, to or from points within the city, for hire or pay." Section 3617 Burns 1901, among other things provides that "The common council shall have power to levy and cause to be assessed and collected * * * a specific tax on omnibuses, or other carriages and other vehicles used, and run for passengers for hire, unless the same be

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licensed." An act of the legislature, approved March 2, 1897 (Acts 1897, p. 113), which is supplemental to the general laws pertaining to cities, provides: "That common councils of incorporated cities shall have the power to enact and enforce ordinances. * * * Second. To license, tax and regulate vehicles." This provision of the statute is not intended to apply to vehicles as property, but is applicable only to taxing or regulating their use upon the public streets of a city.

The charter of the city of Indianapolis confers upon the common council the power "to license, tax and regulate wheeled vehicles," and provides that the funds derived therefrom shall be applied only to the maintenance and repair of the streets and alleys of the city. The council passed an ordinance whereby a license tax was imposed for the use of certain specified vehicles on the streets of the city.

In the appeal of *Tomlinson v. City of Indianapolis*, 144 Ind. 142, 36 L. R. A. 413, the appellant was a nonresident of the city of Indianapolis, engaged in marketing garden produce without having procured a license for his market-wagon as required by the ordinance. He was convicted for a violation thereof in using his unlicensed wagon on the public streets of the city, and on appeal to this court it was held that the city, under its charter, was fully empowered to require a nonresident of the city to pay a license fee for using its streets by running a market-wagon thereon in like manner as residents of the city were required to pay under the ordinance. In that case it was said that the license fee exacted was not a tax on personal property, but was rather in the nature of a toll charged for the use of the improved streets over which vehicles are driven. The writer of the opinion, however, in that case, seems to have fallen into the error of asserting, in effect, that the city in exacting the license tax was doing so in the exercise of the police

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power, and not of the taxing power expressly conferred upon it by the legislature.

There is no force in the claim of counsel for appellees that the ordinance herein involved violates §1, of article 10, of the State Constitution which provides for a uniform and equal rate of assessment and taxation; for it has been decided by this court, and is affirmed by other authorities in respect to similar constitutional provisions, that this section of our fundamental law relates to a general assessment of taxes on property according to its value. *Thomasson v. State*, 15 Ind. 449, and cases there cited; *State v. Mayor, etc.*, 58 N. J. L. 604, 33 Atl. 850; *Burroughs, Taxation*, §77.

By §3623 Burns 1901, §3161 Horner 1901, the common council of the city of Terre Haute, at the time the ordinance in controversy was adopted, was given the exclusive power over its public streets. The city, under this authority, held such streets in trust for public purposes. *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, and cases cited. In addition to the powers conferred by the above section and other provisions of law by which the city was controlled, it, as we have shown, was expressly empowered by the legislature in 1897 not only to license and regulate vehicles, but also to tax them. It must be conceded that cities and towns of this State can not exercise the power of taxation under the guise of a license or otherwise, unless such power is unequivocally conferred upon them by the legislature. When such power is, however, clearly conferred upon such municipalities, courts have generally upheld the proper exercise thereof.

The running of hacks, carriages, and other vehicles over the streets of a city, whether used thereon for public or private purposes, will necessarily, in the course of time, impair and wear them out; and, by reason of this well recognized fact, cities are subjected to large expenditures of money to repair the wear and tear upon their streets,

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due, in the main, to the use or running of vehicles thereon. Under such circumstances there is nothing unjust or wrong in a city, when so empowered by the legislature, requiring the payment of a properly or reasonably graduated tax, as in the case at bar, which must be considered in the nature of a toll imposed for the exercise of the privilege of using the streets by means of vehicles. In fact, the right of exacting the payment of such a license tax is akin to the principle by which the establishment of toll roads over public highways by virtue of legislative authority, and the right to collect toll from persons traveling in vehicles thereon, is sustained. The legislature of this State has the right, and in the past has exercised the same, to authorize a turnpike company to lay out its road over a public highway, and to exact toll from those who drive vehicles thereon. While every person, under like circumstances, has the right to use such turnpike as a highway, nevertheless for the privilege of doing so he must pay the reasonable tribute or toll laid on all travelers alike. Elliott, Roads and Sts. (2d ed.), §71; Cooley, Taxation (2d ed.), 130; Angell, Highways (3d ed.), §8.

In §454 of Judge Elliott's work on Roads and Streets (2d ed.), that eminent author says: "A license or tax on all vehicles used for hire on the public streets may be enforced, although the owner of a vehicle so used lives outside the city limits." That municipal corporations may be empowered by the legislature to impose a tax upon owners of vehicles for using the same upon the public streets, is, as a general proposition, fully affirmed by the authorities. Burroughs, Taxation, §77; *Chess v. Birmingham*, 1 Grant Cas. 438; *Bennett v. Birmingham*, 31 Pa. St. 15; *Gartside v. East St. Louis*, 43 Ill. 47; *City of St. Louis v. Green*, 7 Mo. App. 468, s. c. 70 Mo. 562; *State v. Mayor, etc.*, 58 N. J. L. 604, 33 Atl. 850; *Marmet v. State*, 45 Ohio St. 63, 12 N. E. 463; *Smith v. City of Louisville*, 9 Ky. L. 779, 6 S. W. 911; *Tomlinson v. City of*

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Indianapolis, 144 Ind. 142, 36 L. R. A. 413. See cases collected in foot note to the case last cited in 36 L. R. A. 413.

In *Burroughs, Taxation*, §77, the author says: "When the amount of the fee is only such as would probably cover the expense of enforcing the regulations of the state as to the particular calling, it is under the police power, but when the fee is larger than is necessary for such purpose, and is exacted with reference to revenue, the license is issued under the taxing power of the state. This is a most convenient mode of taxation, and is recognized in the constitutions of most of the states, where it is contrasted with the property tax, in those provisions which limit the power of the state to tax property otherwise than by a uniform system and according to value. But whether mentioned in the constitution or not, the provisions as to equality and uniformity do not apply to taxes on licenses."

The fact that a vehicle is not used by its owner for hire, but is only used on the streets in his own business or for his own pleasure, is of no special importance, when the power is conferred to license and tax vehicles generally.

The legislature of Maryland imposed a license tax on persons keeping or exhibiting for use a billiard-table. A club, organized for literary and social purposes, kept a private billiard-table for the use and amusement of its own members. This club, under the statute, in *Germania v. State*, 7 Md. 1, 5, was held liable for the tax; the court holding therein that the state was empowered to tax the amusements of the people, either for revenue, or as a police regulation.

That the power of the legislature in matters of taxation for public purposes is unlimited, except so far as restrained by the State or federal Constitution, is well settled. *Lowe v. Board, etc.*, 156 Ind. 163, and cases there cited. That the State possesses plenary powers over public highways and streets is a proposition also well settled. While it is

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true that a public street of a city or town is a public highway, open alike to travel thereon of every citizen, still this in no wise prevents the State through the agency of its municipalities from subjecting the right to the use of the street to reasonable conditions or restrictions. As cities in this State, under the law, are required to keep their streets in repair, the legislature, in the exercise of its discretion, appears to have deemed it proper to authorize common councils thereof, if they so desired, to exact that those who used them with wagons, carriages, and other vehicles should contribute to such repairs by the payment of a reasonable amount on account of such use.

The ordinance in question seems so to grade the tax imposed that the owners of vehicles whose use of the streets, in the course of time, would subject them to the most wear are required to pay the greater tax. The tax being imposed, as disclosed by §5 of the ordinance, for the purpose of raising revenue to be applied to the maintenance and repair of the streets, it would be inconsistent and unreasonable to graduate the amount to be paid according to the value of the vehicles. Their value, under the circumstances, can not be considered as a factor in regard to the wear or injury to the streets resulting from their use thereon, for it is manifest that a wagon or carriage worth not to exceed \$50 might, in its use upon the streets, serve to wear them as much or more than one of the value of \$500.

In our opinion, the ordinance is not open to any of the objections, constitutional or otherwise, urged by counsel for appellees; and as the power to adopt it, as we hold, was expressly conferred by the legislature, we are, for the reasons herein stated, constrained to sustain it as a valid exercise of the power conferred upon appellant's common council. It follows, therefore, and we so conclude, that the lower court erred in holding the ordinance void, and in enjoining appellant from enforcing it against the appellees. The judgment is therefore reversed, and the cause re-

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manded to the lower court for further proceedings not inconsistent with this opinion.

DEANE v. THE STATE.

[No. 19,890. Filed October 14, 1902.]

APPEAL.—*Misdemeanor.—Construction of Statute.—Intoxicating Liquors.*

—The question of "the proper construction of a statute" within the meaning of §8 of the act of 1901 (Acts 1901, p. 585), containing an exception to the provision of said act denying the right of appeal in cases of misdemeanor is not presented by a motion to quash an affidavit charging appellant with violating §7283c Burns 1901, by permitting persons other than members of his family on a legal holiday, to enter his place of business wherein he was engaged in the sale of intoxicating liquors, because the affidavit did not charge that appellant was the proprietor of a room in which intoxicating liquors were sold by virtue of a "license" under the laws of the State of Indiana, the statute being plain in its provisions.

159 313
162 136

From White Circuit Court; *W. S. Bushnell*, Special Judge.

William Deane was convicted of permitting persons on a legal holiday to enter his place of business where intoxicating liquors were sold, and he appeals. *Appeal dismissed.*

A. W. Reynolds, A. K. Sills and G. C. Reynolds, for appellant.

W. L. Taylor, Attorney-General, *C. C. Hadley and Merrill Moores*, for State.

JORDAN, J.—Appellant was indicted for and convicted of violating the provisions of §3 of the liquor law of 1895, §7283c Burns 1901, by permitting persons other than members of his family, on the 4th day of July, 1900, to enter his place of business wherein he was engaged in the sale of intoxicating liquors to be used and drunk as a beverage. From the judgment of conviction he has appealed directly to this court, and the only error assigned is that the lower

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court erred in overruling his motion to quash the indictment.

As the crime of which appellant was convicted is only a misdemeanor, the right of appeal is denied under §7 of an act approved March 12, 1901 (Acts 1901, p. 565), unless the case can be said to fall within some of the exceptions embraced in §8 of that act. Section 3 of the liquor law of 1895, commonly known as the Nicholson law, is as follows: "Any room where spirituous, vinous, malt or other intoxicating liquors are sold by virtue of a license under the laws of the State of Indiana, shall be so arranged that the same may be securely closed and locked, and admission thereto prevented and the same shall be securely locked and all persons excluded therefrom on all days and hours upon which the sale of such liquors is prohibited by law. It is hereby made unlawful for the proprietor of such a place and the business herein contemplated of selling intoxicating liquors, to permit any person or persons other than himself and family to go into such room and place where intoxicating liquors are so sold upon such days and hours when the sale of such liquors is prohibited by law." Acts 1895, p. 284.

The indictment under which appellant was convicted, omitting the formal parts, reads as follows: "The grand jurors of White county, in the State of Indiana, good and lawful men, duly and legally impaneled, charged and sworn to inquire into felonies and certain misdemeanors in and for the body of said county of White, in the name and by the authority of the State of Indiana, on their oath present that one William Deane, late of said county, on the 4th day of July, A. D. 1900, at and in the county of White, in said State of Indiana, he, the said William Deane, being then and there the proprietor of a certain room situate in Monticello, in said county of White, and State of Indiana, and which said room was then and there situated on the following land, to wit [here follows the description of the

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real estate], in which said room intoxicating liquors were then and there sold by said William Deane under and by virtue of the laws of the State of Indiana, to be used and drunk as a beverage, and to persons not then and there holding a prescription from a reputable physician, did then and there unlawfully permit divers persons, whose names are unknown to said grand jurors, but who were not then and there members of the family of said William Deane, to go and enter into said room where said liquors were so sold as aforesaid on the 4th day of July, 1900, the said 4th day of July, 1900, being a legal holiday, contrary," etc.

An inspection of this indictment certainly discloses that the prosecution is based upon §3 of the liquor law of 1895. The contention of counsel for appellant is that the indictment is bad, and ought to have been quashed, because it does not charge that the accused "was the proprietor of a room where spirituous, vinous, malt, and other intoxicating liquors were sold by virtue of a license under the laws of the State of Indiana."

And the further contention is advanced that the alleged insufficiency of the indictment upon the motion to quash raises and duly presents the proper construction of §3, *supra*, hence, under the exception provided by §8 of the act of March 12, 1901 (Acts 1901, p. 565), appellant's right to appeal to this court is sought to be sustained. There is no contention on his part that upon a proper construction of §3, *supra*, it ought to be held that it does not define a public offense, or that the law, so far as applicable to this action, can be said to be impressed with some ambiguity which presents a question of construction within the meaning of §8, *supra*; but the sole insistence, seemingly, is that the averments of the indictment, or, rather, the omission to employ therein the word "license" rendered the indictment insufficient to charge the offense within the plain words of the act defining the same. Or, in other words, because the exact words or language of the statute

were not used in drafting it, the question of its sufficiency depends upon the proper construction of the section upon which the prosecution rests. Appellant's contention, under the circumstances, certainly can not be said to present any question for the proper construction of the statute within the meaning of the exception as declared in §8, *supra*, but rather, raises one which wholly relates to the construction of the pleading. The language of §8, *supra*, so far as it can be said to concern this case is, "Every case in which there is in question, and such question is duly presented, * * *" for "*the proper construction of a statute*, * * *" shall be appealable directly to the Supreme Court, for the purpose of presenting such question only." (Our italics.)

Certainly the phrase "the proper construction of a statute" can not be said to apply to or include a statute which is so plain in its terms and provisions as to leave no room for judicial construction, otherwise the prohibition of §7, denying an appeal, could be easily evaded upon the mere assertion of an appellant that the point involved in the case depended upon the construction of a statute. Where the act is, under its terms and provisions, plain and unambiguous, and admits of but one meaning, it can not be said to be open to a construction within the meaning of the exception in §8. Under such circumstances the law, if valid, must be taken and enforced as written, for it is not permissible to interpret or construe that which has no need of construction. The province of construction, as the authorities assert, lies wholly within the domain of ambiguity. Endlich, *Interp. of Stat.*, §4; Sedgwick, *Stat. Con.* (2d ed.), 195; 23 *Am. & Eng. Ency. Law*, 298, and authorities cited in foot note 2; *State v. Sopher*, 157 Ind. 360.

Black in his construction and interpretation of laws, on page 1, says: "Construction, as applied to written law, is the art or process of discovering and expounding the meaning and intention of the authors of the law with re-

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spect to its application to a given case, where that intention is rendered doubtful either by reason of apparently conflicting provisions or directions, or by reason of the fact that the given case is not explicitly provided for in the law."

Whether a question might arise in some given case which would depend on the construction of §3, *supra*, within the intent and meaning of the exception in controversy, we need not decide. It is manifest, however, we think, that no question involving its construction under the particular facts in this case is presented within the meaning of the exception mentioned. It follows, therefore, that by virtue of the prohibition of §7, *supra*, we can not entertain this appeal and the same is ordered to be dismissed.

EMERICK v. MILLER ET AL.

[No. 19,341. Filed May 21, 1902. Rehearing denied October 14, 1902.]

159	317
159	589
159	817
161	124

MORTGAGES.—*Foreclosure.*—*Possession.*—*Writ of Assistance.*—The circuit court, sitting as a court of equity, has the power to issue the summary writ of assistance to put the purchaser at a mortgage foreclosure sale in possession. *pp. 319-325.*

SAME.—*Foreclosure.*—*Writ of Assistance.*—A writ of assistance will be awarded to the grantee of the purchaser at a mortgage foreclosure sale. *p. 325.*

SAME.—*Proceedings for Writ of Assistance.*—*Answer.*—*Fraud.*—In proceedings for a writ of assistance by one claiming possession of real estate under a mortgage foreclosure sale, an answer by the mortgagor that the decree was procured by fraud is insufficient on demurrer; it not being averred in such answer that suit was pending to set aside such decree, or that such suit was contemplated. *pp. 326-329.*

From Wabash Circuit Court; *U. Z. Wiley*, Special Judge.

Proceeding for a writ of assistance by Harry L. Miller against Louisa G. Emerick. From a decree for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337j Burns 1901. *Affirmed.*

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M. Winfield and E. S. Morris, for appellant.

John Mitchell, W. B. McClintic, H. P. Loveland and R. J. Loveland, for appellee.

HADLEY, J.—Appellee being the grantee of the purchaser at sheriff's sale in a foreclosure proceeding, and being denied by the judgment defendant possession of a part of the premises purchased, upon notice and motion procured a redocketing of the foreclosure case, and thereupon filed his petition for a writ of assistance. The undisputed facts set forth in the petition are to the effect following: The foreclosure complaint was sufficient; appellant was the sole mortgagor defendant, and was timely and duly summoned to appear thereto; she did not appear, and a decree of foreclosure was duly entered against her, and a sale thereunder of the mortgaged premises was made by the sheriff to Milton Shirk, a judgment plaintiff, in accordance with the law and decree, March 19, 1898, for the full amount of the judgment, principal, interest, and costs. There was no redemption, and the year having expired March 21, 1899, a deed conveying the property was duly executed and delivered by the sheriff to the purchaser. Ten days after the conveyance to Shirk, and the record of his deed in the recorder's office of the county, to wit, April 1, 1899, appellant, who had all the time since the rendition of the decree been a resident of the county, and possessed of knowledge of the decree and sale of her land, filed in the Miami Circuit Court her complaint against the judgment plaintiffs for relief against said decree and sale, for fraud of the plaintiffs in the procurement of the decree. During the formation of the issues in her case, upon motion of the defendants, she was summoned to appear and answer, under oath, certain questions to be propounded to her by the defendants touching the issues. She did appear and make answers which were taken down in shorthand, and when put in longhand she refused to subscribe her name thereto. Her refusal to sign was reported by the defendants to the

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court, whereupon the court, on defendants' motion, entered an order against her to show cause why she did not sign said answers, on penalty of a dismissal of her cause. She did not obey said order, and the court thereupon, May 25, 1899, dismissed her suit.

Appellant, in her answer, having admitted the foregoing facts, affirms that she had, at the time the foreclosure suit was commenced, and still has, a meritorious defense thereto, which she neglected to make, by the fraud of the plaintiffs, which defense she sets forth in detail, and that the reason she refused to sign her answers to interrogatories was because she was denied the privilege of first taking the long-hand manuscript thereof with her to read over and submit to her attorney for his counsel; that after the dismissal of her suit for failure to obey the order of the court, to wit, on June 22, 1899, Shirk, the purchaser, conveyed the property by quitclaim deed to appellee Miller, who at the time of his purchase had knowledge of the fraudulent character of the judgment; that she refused, upon Miller's demand, and still refuses, to surrender possession. There is no averment that she has or intends to renew the dismissed action, or take any other step for relief against said decree and sale. This action was commenced on the 11th day of October, 1899. The petitioner's demurrer to the answer was sustained.

The assignment propounds for decision the following questions: (1) Has the circuit court, sitting as a court of equity, since the adoption of our practice code, power to issue the summary writ of assistance to put the purchaser at its foreclosure sale in possession? (2) If the power exists, can it, in any case, be invoked by the grantee of the purchaser? (3) Are the facts exhibited by the answer sufficient in equity to warrant a denial of the writ?

I. Appellant, while conceding that courts of equity, under the old practice, had the power to employ the writ of assistance in the enforcement of their decrees, contends

that by our code of procedure the power has been supplanted by the remedial modes prescribed by the statute; the argument being that since the legislature has abolished the distinction in pleading and practice between legal and equitable causes, and provided a special remedy, in all cases, for obtaining possession of real estate wrongfully withheld, no other mode can exist by implication. The statute, §249 Burns 1901, provides that "There shall be no distinction in pleading and practice between actions at law and suits in equity; and there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action." It will be observed that the statute is directed solely to court procedure; to the striking down of the particular names, the technical forms, and classification of actions under the old law; and to the presentation of a scheme supposed to simplify judicial proceedings, whereby the plaintiff is at liberty to state the facts of his case to the court in writing, and if, according to his statement, he appears to be entitled to relief of any kind, legal or equitable, he will have a good complaint, be in the right court, and entitled to receive whatever is justly his.

Simplification of procedure may be said to be the full scope and purpose of the code. The statute does not pretend to, nor does it in any sense, abridge the inherent power of the courts, nor affect the rights of parties, or the remedies formerly given for a violation of those rights, further than to change, in some instances, the means by which the remedy may be obtained. Neither were the rules of law nor the principles of equity changed by blending in the same form of action, and by being permitted to run together through the same proceeding. *Matlock v. Todd*, 25 Ind. 128; *Woodford v. Leavenworth*, 14 Ind. 311, 314; Bliss, Code Pl. (3d ed.), §§5, 6, and note 17. Therefore, in the absence of express limitation in the code, we find no reason for holding that those rules and principles, which long

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experience found necessary to a dispensation of complete justice in certain cases, may not still be applied to facts which come within the class that gave rise to the remedy.

There is no warrant for construing §1062 Burns 1901, as creating a specific and exclusive remedy for the recovery of possession of real estate under the modified system of pleading and practice. The similar but more formal remedy of ejectment is of very ancient origin, and coexisted with the writ of assistance for a long period before our code was thought of. Both remedies had been found necessary to the full administration of justice, the action of ejectment to courts of law for the settlement of controverted questions relating to possession and possessory titles; and the writ of assistance to courts of equity, in certain cases only, not in aid of their jurisdiction, but to enable them to carry out and make complete the execution of their decrees. Appellant's counsel say in their brief: "As emphasizing our contention that the action for possession, provided in §1062, *supra*, is the only mode in which the possession of real property may be recovered, it is expressly provided in §1096 Burns 1901 that 'the plaintiff shall be entitled to an execution for the possession of his property, in accordance with the provisions of this act, but not otherwise.'" We can not concede that the section quoted adds any strength to appellant's argument, or that it is even pertinent. By reference to the original act (Acts 1881, p. 363) it will appear (1) that the word "act" in the last line should read "article,"—a mistake that found its way into the revision of 1881, and has been adopted by every subsequent compiler; (2) the section occurs under the article or subtitle of the code "Occupying Claimant," and has special and exclusive reference to the conditions upon which the successful plaintiff against the occupying claimant who has improved and enhanced the value of the real estate may have execution for possession.

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In *Kershaw v. Thompson*, 4 Johns. Ch. 609, Chancellor Kent says: "The distribution of power among the courts would be injudicious, and the administration of justice exceedingly defective, and chargeable with much useless delay and expense, if it were necessary to resort, in the first instance, to a court of equity, and afterwards to a court of law, to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz., the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down as a general rule, that the power to apply the remedy is coextensive with the jurisdiction over the subject-matter. A bill to foreclose the equity of redemption is a suit concerning the realty, and *in rem*; and the power that can dispose of the fee, must control the possession. The parties to the suit are bound by the decree; their interests and rights are concluded by it; and it would be very unfit and unreasonable, that the defendant, whose right and title had been passed upon and foreclosed by the decree, should be able to retain the possession, in despite of the court. This is not the doctrine of the cases, nor the policy of the law." See, also, *Root v. Woolworth*, 150 U. S. 401, 411, 14 Sup. Ct. 136, 37 L. Ed. 1123; *Schenck v. Conover*, 13 N. J. Eq. 220, 78 Am. Dec. 95; *Aldrich v. Sharp*, 3 Scam. (Ill.) 261; *Cochran v. Fogler*, 116 Ill. 194, 5 N. E. 383; *Kirsch v. Kirsch*, 113 Cal. 56, 63, 45 Pac. 164; 2 Ency. Pl. & Pr., 975.

It is true, in this State we have no longer such a thing as a strict foreclosure of real estate mortgages, such as existed when writs of assistance had their origin, but the underlying principles of the writ remain unchanged. In a strict foreclosure, upon default, the mortgagor was given by the decree a specified time in which to redeem. If he failed to do so within the time fixed, the sale was made by the court's master or commissioner, and effected an abso-

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lute dispossession of title in the mortgagor. The rights of the parties as they then existed having been thus adjudicated, and the mortgaged premises forfeited by the mortgagor, and sold by the court to reimburse the plaintiff, it was deemed that the matter in litigation was not complete, nor the remedy fully realized until the court had placed the purchaser in possession of the thing it had sold him. Under the present system the time accorded the mortgagor for redemption after default is fixed by statute to the certain period of one year after sale, in lieu of an uncertain period, within the discretion of the chancellor, before sale; but the redemption must now be made, if made at all, upon precisely the same terms,—by payment to the use of the plaintiff of the full amount of the secured debt, principal, interest, and accrued costs. It is true the sheriff now makes the sale and the deed of conveyance; but in the doing of these things he is executing the court's decree, and acting as the officer and hand of the court in every sense that the master so acted under the old practice.

A sale so made is a judicial sale, and the deed of the sheriff executed in pursuance thereof is as effective and conclusive as a conveyance of the title as when *vised* and approved by the chancellor. "It is usual," says Fields, J., in *Montgomery v. Tutt*, 11 Cal. 190, "to insert [in the decree] a clause * * * [that possession be delivered to the purchaser], but it is not essential. It is necessarily implied in the direction for the sale and execution of a deed. The title held by the mortgagor, passes under the decree to the purchaser, upon the consummation of the sale by the master's or sheriff's deed. As against all the parties to the suit, the title is gone; and as the right to the possession, as against them, follows the title, it would be an useless and vexatious course to require the purchaser to obtain such possession by another suit."

Moreover, under our present procedure, when the rights of the mortgagor and mortgagee to the pledged property

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have been fully adjudicated and settled between them in favor of the mortgagee, and the court orders a sale for the satisfaction of the secured claim, and the sale is made under the process of the court, and the mortgagee becomes the purchaser, as is usually the case, and enters satisfaction of his claim, if at the end of the year, without redemption, the mortgagor still retains possession, and refuses to surrender it to the purchaser, can it be said that the latter has had redress, until he gets possession of that which he had accepted, under the authority of the court, in discharge of his debt? And when at the end of the year for redemption the rights and relations of the parties to the property remain the same as at the rendition of the decree, as between them can there be any reason why the same court, in the same case, should not effectuate its decree by requiring the debtor to surrender that which the court had adjudged he should surrender? It does, indeed, seem unreasonable in such cases that the purchaser shall be required to bring another action on the law side of the court for judgment that the decree of the equity side of the court, shall be obeyed. In the absence of statutory limitation the rule announced by Chancellor Kent "that the power to apply the remedy is coextensive with the jurisdiction over the subject-matter," is unassailable in reason. It seems, also, paradoxical to say, in cases where all the questions between the parties, relating to the title and right of possession, remain settled by the original decree, that the judgment plaintiff has fully realized the remedy awarded him, when required to bring an action of ejectment to get possession of that which the court, in effect, decreed he should have, and be delayed in its enjoyment by the ordinary changes of venue, postponements, and appeals, for an indefinite period.

A writ of assistance is a summary proceeding, and does not admit of a trial of any *bona fide* question as to the right of possession. Any such question that exists by reason of anything not concluded by the original decree, or

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that has subsequently arisen from the conduct or contract of the parties, must be determined by the ordinary action. The writ issues only when the right to possession by the petitioner is clear, and presupposes that the rights of the parties and privies with respect to the property remain the same as upon the original decree, and such as follow the decree and the sale had thereunder. *Roach v. Clark*, 150 Ind. 93, 98, 65 Am. St. 353, and cases cited; *Gilliland v. Milligan*, 144 Ind. 154; *Barton v. Beatty*, 28 N. J. Eq. 412; *City of San Jose v. Fulton*, 45 Cal. 316, 319; *Van Hook v. Throckmorton*, 8 Paige 33. ,

II. There is some diversity of opinion in the American courts as to the right of a grantee of the purchaser to the writ, and a few cases go to the extent of holding that a purchaser not a party to the record will be denied the writ. But as said in the text of Encyclopaedia of Pleading and Practice (Vol. 2, 978): "According to the weight of modern authority, it will be awarded in favor of the grantee of such purchaser. See *Ekins v. Murray*, 29 N. J. Eq. 388; *Ketchum v. Robinson*, 48 Mich. 618, 12 N. W. 877; *Gibson v. Marshall*, 64 Miss. 72, 8 South. 205; *Brown v. Betts*, 13 Wend. 29; *McLane v. Piaggio*, 24 Fla. 71, 3 South. 823; *Langley v. Voll*, 54 Cal. 435; *New York Life Ins. Co. v. Rand*, 8 How. Pr. 35; *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123; *Beach*, Mod. Eq. Pr., §§898, 900.

It is clear that a transfer of title will not enlarge the rights of the transferee, nor impair any right to resist the writ, possessed by the tenant in possession against the original purchaser, but we perceive no reason why an assignee or vendee is not entitled to the same relief that his vendor could have asserted. We therefore hold that appellee, having received and exhibited his deed to appellant, and made demand upon her for possession before filing his petition, stood in the shoes of his grantor, Shirk, and entitled to the

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same consideration that Shirk himself would have received as a petitioner for the writ while he remained the owner.

III. Appellant concedes in effect that the foreclosure proceedings were regular, and sufficient to confer title upon the purchaser at the sheriff's sale. Aside from the assumed want of power of the court to issue a writ of assistance, she grounds her defense to the writ solely upon a latent infirmity in the record, existing by reason of the plaintiff's fraud in the procurement of the original decree. She also avers in her answer that after appellee's grantor had received the sheriff's deed, and had made demand upon her for possession, she brought an action against the original judgment plaintiffs, setting forth the fraud by means of which the plaintiffs procured their decree, and prayed the court for a nullification of the decree and sale made thereunder, and that subsequently the court dismissed her said action for her failure and refusal to obey the order of the court to subscribe her deposition. At the time this petition and answer thereto were filed, appellant had pending no action to be relieved from said decree, and in her answer she stated no purpose or intention to renew or bring such an action.

Appellant, being in possession, relies upon her right to remain passive and to make her resistance whenever the plaintiffs attempted to consummate their alleged fraud by dispossessing her; and she cites *Brake v. Payne*, 137 Ind. 479, and other cases of that class, in support of her position. Her answer to the petition proceeds upon the theory that a party against whom a fraudulent judgment has been rendered, may ignore the judgment, though fair upon its face, for an indefinite period, and successfully defeat the process of the court whenever put in operation against him, without any affirmative action on his part to have the judgment declared invalid. Such is not the law, nor the holding in the cases referred to. In the *Brake* case the defrauded judgment defendant became the aggressor and brought his action to enjoin the levy of execution and en-

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forcement of the judgment. No case has been cited, and we presume none can be found, that goes to the extent of holding that a judgment valid upon its face may be wholly disregarded and its enforcement avoided by the debtor without an effort on his part to establish its invalidity in some way known to the law. It is no longer open to doubt, that a question once decided—whether rightfully or wrongfully—by a court of competent jurisdiction, is forever settled between the parties to the record while the judgment which determines the question remains in full force. "So long as that adjudication is allowed to stand," says Mitchell, J., in *Weiss v. Guérineau*, 109 Ind. 438, "it must be regarded as speaking the exact truth in respect to the rights and liabilities of all those who were parties to it, so far as their rights, therein involved, existed on the day the decree was given."

It makes no difference in the conclusiveness of a judgment or decree that the same has been procured by fraud. Unassailed, it stands as a verity. If the injured party wishes to be relieved from its forces and effect, he must take some proper step to bring the question of his wrong before the court that imposed it for correction. "A party against whom an unauthorized or inequitable judgment has been obtained," continues Justice Mitchell, "whether by fraud or mistake, can not treat the judgment as invalid until he has taken some proceeding, known to the law, to set it aside, or to secure its modification. Methods for obtaining a new trial, or to review a judgment for material new matter, or for error of law, are pointed out by the statute, and beyond the methods thus prescribed, courts possess inherent power, to an almost unlimited extent, to redress wrongs by modifying or setting aside judgments obtained by fraud or mistake. These methods, however, all contemplate proceedings in the case in which the unauthorized judgment is alleged to have been obtained. They give no countenance to the notion that a judgment, however wrongfully ob-

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tained, may be ignored, and the rights of the parties again inquired into, in a collateral proceeding. So long as the judgment stands, not being void, it concludes the parties upon the subjects therein determined *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Krekeler v. Ritter*, 62 N. Y. 372; *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42; *Wiley v. Pavey*, 61 Ind. 457, 28 Am. Rep. 677; *Cavanaugh v. Smith*, 84 Ind. 380; *Reid v. Mitchell*, 93 Ind. 469; *Freeman*, Judg., §§334, 287-9; *Bigelow*, Estop., 148-9."

In his section 334 *Freeman* states the same principles thus: "A party to a judgment feeling himself aggrieved thereby may, in a proper case, either move that it be vacated, or prosecute an appeal or writ of error, or maintain a suit in equity to enjoin its enforcement. These, unless the judgment is void on its face, are the only remedies open to him, and if he resorts to neither, or resorting to any or all he is denied relief, he can not avoid the judgment, when offered in evidence against him, by proving that it ought not to have been pronounced, and was procured by fraud, mistake, perjury, or collusion, or through some agreement entered into by the prevailing party, and which he neglected or refused to perform." *Freeman*, Judg. (4th ed.) §334. See, also, *Bruce v. Osgood*, 154 Ind. 375, and authorities there collated.

Mrs. Emerick has not brought herself within this well established rule. With full knowledge, as she avers, that the court had entered a decree foreclosing her rights in, and ordering a sale of her property for payment of the plaintiff's debt, and that the sale had been made, and the property purchased by Shirk, one of the plaintiffs, she permitted the year for redemption to expire, and the sheriff to convey the property to Shirk. More than this: After Shirk had recorded his deed and demanded and taken possession of part of the property under his sheriff's deed, she instituted her action in the proper court, challenging the

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validity of the judgment, and asking that the same be set aside and the sale thereunder vacated. This proper proceeding she voluntarily abandoned by contumaciously putting herself in contempt of the court, with full knowledge that the penalty would be a dismissal of her suit. When thus put out of court, her situation was precisely the same as if she had never questioned the foreclosure proceedings; and her silent defiance of the court's power, continued for more than four months thereafter before the filing of the petition herein, and against the petitioner's demand for possession and profert of his grantor's deed to him must be deemed a disavowal of any intent to attempt the overthrow of the judgment. In the absence of some overt act to impeach the judgment, she had no right to obstruct the proper process of the court in the execution of its decree, and the demurrer was therefore rightfully sustained.

Exceptions were saved to the overruling of motions which present the same questions as above decided, and they are not therefore considered.

Judgment affirmed.

 NOONAN v. BELL ET AL.

[No. 19,867. Filed October 15, 1902.]

APPEAL AND ERROR.—*Assignment of Error.*—*Exception.*—The action of the court in sustaining the separate demurrers of two defendants to plaintiff's complaint involved two rulings, and in order to question such rulings on appeal an exception must be taken to each.

From Blackford Circuit Court; *E. C. Vaughn*, Judge.

Action by William Noonan against George R. Bell and another for damages. From a judgment for defendants. plaintiff appeals. *Affirmed.*

O. W. Cranor, Frank Mann, H. S. Fargo and T. A. Kegerries, for appellant.

Enos Cole, W. H. Honey, S. W. Cantwell and L. B. Simmons, for appellees.

159	329
161	227
161	691

159	329
e167	253
e167	609
e168	673

159	329
q170	277

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GILLETT, J.—This action was instituted by appellant to recover damages from appellees. The latter, by their respective counsel, severally demurred to the amended complaint for want of facts. After setting out the several demurrers mentioned, the record contains the following entry: "And the court, after being fully advised in the premises, sustains the separate demurrer of each defendant, to which ruling of the court the plaintiff at the time excepts."

Each demurrer presented the question as to the sufficiency of the amended complaint as against the demurring defendant. The entry therefore involves two rulings. An exception must be directed against a designated ruling. It is not competent to reserve exceptions in gross. *City of South Bend v. Turner*, 156 Ind. 418, 54 L. R. A. 396, 83 Am. St. 200; *Walter v. Walter*, 117 Ind. 247; *Johnson v. McCulloch*, 89 Ind. 270; *Leyner v. State*, 8 Ind. 490; *Wilson v. Wolfer*, 8 Ind. 398; *Elliott*, App. Proc., §§787, 789. The assignments of error are all predicated on said rulings on demurrer, and it therefore follows that there is no basis for an inquiry into the correctness of the judgment below.

Judgment affirmed.

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el66 460

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS
RAILWAY COMPANY v. TOWN OF
CROTHERSVILLE ET AL.

[No. 19,746. Filed October 17, 1902.]

NUISANCE.—*Abatement.*—*Injunction.*—*Complaint.*—On the ground that he who comes into a court of equity must come with clean hands, the plaintiff in a suit to enjoin the abatement of stock-pens as a public nuisance must allege and prove that the stock-pens were not a public nuisance, although the defendants were without authority to abate such nuisance. p. 332.

TRIAL.—*Practice.*—*Burden of Proof.*—*Opinion of Court.*—A motion by plaintiff that the court rule that the burden of proof is upon the defendant furnishes no ground for an exception. pp. 332, 333.

Pittsburgh, etc., R. Co. v. Town of Crothersville.

NUISANCE.—Abatement.—Injunction.—Burden of Proof.—In a suit by a railroad company to enjoin the abatement of stock-pens as a public nuisance, the burden of proof is on the plaintiff to show that the stock-pens, as maintained, were not a nuisance. *p. 334.*

SAME.—Similar Nuisances in Same Vicinity.—One who maintains a public nuisance is not justified or excused because others in the same vicinity maintain similar nuisances. *p. 334.*

From Jackson Circuit Court; *T. B. Buskirk*, Judge.

Suit by the Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company against town of Crothersville and others to enjoin the abatement of an alleged nuisance. From a decree for defendants, plaintiff appeals. *Affirmed.*

S. Stansifer, J. F. Applewhite, Ralph Applewhite and M. Z. Stannard, for appellant.

J. A. Cox and O. H. Montgomery, for appellees.

MONKS, J.—It appears from the record that appellees, the town of Crothersville, its board of health and marshal, were taking steps and threatening to remove appellant's stock-pens in said town, on the ground that they were a public nuisance, and that this suit was brought to enjoin them from doing so. The complaint was in three paragraphs, the second and third of which were held by the court insufficient on demurrer for want of facts. Appellees filed a general denial to the first paragraph. The court heard the case, made a special finding of the facts, stated conclusions of law thereon in favor of appellees, and rendered final judgment against appellant.

It is first insisted by appellant that the court erred in sustaining appellee's demurrer to the second and third paragraphs of complaint.

Appellant's second paragraph of complaint proceeded upon the theory that, as there was a vacancy in the board of trustees of the town of Crothersville, the acts of the remaining trustees, acting as a board of health, in declaring appellant's stock-pens in said town, as maintained and used, a public nuisance, and in ordering the abatement of the same, were void, and that for this reason they could be en-

joined from abating them, even if they were a public nuisance.

The theory of the third paragraph was that there was no power delegated to the board of trustees of a town, as such, or as a board of health, to declare that said stock-pens were a public nuisance, and order the abatement thereof, or, if delegated, that such a law was in violation of the Constitution, and that therefore they could be enjoined, although the stock-pens, as maintained and used, were a public nuisance.

It was shown in each of said paragraphs that it was claimed by appellees that said stock-pens, as maintained and used, were a public nuisance, and that the board of trustees of said town, claiming to act as a board of health, had so declared and ordered, and were threatening their removal for that reason. The rule is that he who comes into equity must come with clean hands, or, as sometimes expressed, "He that hath committed iniquity shall not have equity." Fetter, Equity, 37-40; Bispham, Prin. of Eq. (6th ed.), 61, 62, 63; 11 Am. & Eng. Ency. Law (2d ed.), 162, 163. To comply with this rule, in addition to the allegations in each of said paragraphs, facts showing that said stock-pens, as maintained and used, were not a public nuisance, should have been averred. 10 Ency. Pl. & Pr., 931, 932. With the facts already averred in said paragraphs, such allegations were necessary to show that appellant was not in fault; that it came with clean hands.

One of the causes assigned by the appellant for a new trial was that the court erred in ruling that "the burden of proof was upon appellant to prove that the stock-pens were not a public nuisance." It was alleged in the first paragraph of complaint upon which the trial was had, among other things, that the stock-pens, as maintained and used by appellant, were not a public nuisance, and the manner in which the same were maintained and used was specifically set forth. A general denial was the only answer

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filed by appellees. After all of appellant's evidence in chief, except that in support of the allegation that the stock-pens were not a public nuisance, had been given, counsel for appellant stated to the court that he claimed "that the burden of proof on the question of whether or not the stock-pens were a public nuisance rested upon appellees, while appellees contended that it was upon appellant; and thereupon counsel for appellant moved the court to rule that the burden was upon the appellees, which motion the court overruled," on the ground that the burden of proof on the question of whether the stock-pens were or were not a public nuisance was upon appellant, after which appellant introduced its evidence in chief in support of the allegation in the complaint that the stock-pens were not a public nuisance.

This ruling of the court furnished appellant no ground for an exception, for the reason that there was nothing before the court for decision. If counsel for appellant was correct in his contention that appellant's case was made out without any evidence in support of the allegation in the complaint that the stock-pens were not a public nuisance, and that the same was a matter of defense, appellees could not have given any evidence to show that they were a public nuisance, because no such defense was pleaded. In such case it would seem that neither party was entitled to give any evidence on the question of nuisance. If, however, counsel for appellant was correct in his contention that the question of whether or not the stock-pens were a public nuisance was an issue in the case, and the burden of proof as to such issue was on appellees, then he should have rested his case in chief without giving any evidence on that question; and, if appellees introduced any evidence on that issue, he should, after appellees had closed their evidence, have offered evidence to show that the same were not a public nuisance. If the court refused to admit such evidence on the ground that the burden as to that question was upon ap-

pellant, and that the same was necessary to make out appellant's case, and should have been given in chief, an exception to such ruling, and the assignment of the same as a cause for a new trial would have saved the question. If this had been done, an assignment of error that the court erred in overruling appellant's motion for a new trial, would have presented the question in this court.

By the procedure adopted, appellant's counsel obtained the opinion of the court on the question, after which he acted in conformity therewith, instead of adhering to his own theory. The ruling of the court was the mere expression of an opinion which could properly have been refused, and was in reference to a question not then before the court for decision. It is the opinion of the court, however, that, under the issues joined in the cause, the burden was upon appellant to prove that the stock-pens, as used and maintained by it, were not a public nuisance.

During the progress of the trial the court refused to permit appellant to prove "the existence of hog-pens in the immediate vicinity of the stock-pens, and that they were kept in such a manner that stench arose therefrom." There was no error in this ruling of the court. The fact that other persons were, at the time, maintaining similar nuisances in that vicinity, or that the nuisance was caused by appellant and others acting together or independently of each other, was not a matter of justification or excuse.

The acts of several persons acting together or independently of each other may constitute a nuisance, though the injury occasioned by the acts of any one would not have amounted to a nuisance. Gillett, *Crim. Law* (2d ed.), §643; 21 *Am. & Eng. Ency. Law* (2d ed.), 690 (7), 719 (10); 28 *Am. & Eng. Ency. Law*, 970, 971, and note 1; Wood, *Nuisances* (3d ed.), §§168, 169, 448, 449, 558, and notes; *Weston Paper Co. v. Pope*, 155 Ind. 394, 402, 56 L. R. A. 899; *Dennis v. State*, 91 Ind. 291; *City of Valparaiso v. Moffitt*, 12 Ind. App. 250, 54 Am. St. 522; *City*

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of *New Albany v. Slider*, 21 Ind. App. 392, 395; *Rex v. Trafford*, 1 B. & Ad. 874; *Rex v. Neil*, 2 C. & P. 485, 12 Eng. C. L. 690; *Thorpe v. Brumfitt*, L. R. 8 Ch. App. 650; *Blair v. Deakin*, 57 Law Times Rep. N. S., 522; *Crossley v. Lightowler*, L. R. 2 Ch. App. 478; *Hill v. Smith*, 32 Cal. 166; *Barrett v. Mount Greenwood, etc., Assn.*, 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109, 50 Am. St. 168; *Lookwood Co. v. Lawrence*, 77 Me. 297, 52 Am. St. 763; *Seeley v. Alden*, 61 Pa. St. 302, 306, 100 Am. Dec. 642; *Little Schuylkill, etc., Co. v. Richards*, 57 Pa. St. 142, 98 Am. Dec. 209; *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566; *Sullivan v. McManus*, 19 Hun, App. Div., 167, 45 N. Y. Supp. 1079; *Comminge v. Stevenson*, 76 Tex. 642, 13 S. W. 556; *Harley v. Merrill, etc., Co.*, 83 Iowa 73, 48 N. W. 1000; *Euler v. Sullivan*, 75 Md. 616, 23 Atl. 845, 32 Am. St. 420; *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. Rep. 595; *Hurlbut v. McKone*, 55 Conn. 31, 10 Atl. 164, 3 Am. St. 17; *Robinson v. Baugh*, 31 Mich. 290; *Meigs v. Lister*, 23 N. J. Eq. 199; *Ducktown, etc., Co. v. Barnes* • (Tenn.), 60 S. W. 593; *Douglass v. State*, 4 Wis. 387.

It appears from the special finding that for more than thirty-five years prior to 1901, appellant, and those under whom it claimed, had maintained and kept stock-pens near the railroad track on real estate now included within the corporate limits of the town of Crothersville, which town was incorporated in 1892; that said stock-pens have been used by appellant and those under whom it claims for confining stock brought in by shippers for transportation over said railroad, and for loading and unloading said stock. At the time said pens were built, there were no residences near the same on the west, and only a few houses on the east; that since said pens were built, twelve dwelling houses and one church have been erected in the neighborhood of said pens. The affairs of said town of Crothersville were administered by a body of three trustees. On

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October 10, 1900, there were only two members of said board of trustees; and they, acting as the board of health of said town, duly passed a resolution declaring the maintenance of said stock-pens by appellant to be a public nuisance endangering the public health and life, and ordered and required appellant to abate and remove the same on or before December 1, 1900. A copy of said resolution was duly certified and served upon appellant. On November 23, 1900, the state board of health approved said resolution. At the time of the commencement of this action, appellees were threatening to remove said pens on the ground that they were a public nuisance. The court stated as conclusions of law: (1) That "the maintenance of said stock-pens by appellant, in the manner and under the circumstances, created and caused the continuance of a public nuisance; (2) that appellant should take nothing in this action."

We have not stated the facts found as to the place, surroundings and the manner in which the stock-pens were kept by appellant; but it is sufficient to say that they clearly show that when this suit was commenced, and for three years or more prior to that time, the same were a public nuisance.

Appellant insists (1) that the two trustees had no power to act as a board of trustees or board of health until they appointed a trustee to fill the vacancy, as required by §4334 Burns 1901, §3312 R. S. 1881 and Horner 1901, and that the act of the two trustees in adopting the resolution served upon appellant was void; (2) that "no power, either expressly or by fair implication, is delegated to the board of trustees of a town, as such, as a board of health, to declare as in the resolution, or, if delegated, is in violation of the federal Constitution." The view we take of this case renders it unnecessary for us to determine either of these contentions of appellant.

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It is a well settled maxim, that he who comes into equity must come with clean hands. Here appellant, under the facts found, seeks the aid of equity to enjoin the appellees from abating a public nuisance maintained by it, on the ground that they have no right to abate it. To grant such relief to appellant, who is maintaining the public nuisance, would be contrary to the well settled principles of equity. Fetter, Equity, 37-40; Bispham, Prin. of Eq. (6th ed.), 61, 62, 63; 1 Spelling, Inj. and other Extr. Rem. (2d ed.), §26; 11 Am. & Eng. Ency. Law (2d ed.), 162, 163; *Albertson v. Laughlin*, 173 Pa. St. 525, 34 Atl. 216, 51 Am. St. 777; *Unckles v. Colgate*, 148 N. Y. 529, 43 N. E. 59; *Cassady v. Cavenor*, 37 Iowa 300; *Central Trust Co v. Wabash, etc., R. Co.*, 25 Fed. 1; *Fairfield Floral Co. v. Bradbury*, 89 Fed. 393; *Board, etc., v. O'Dell, etc., Co.*, 115 Fed. 574.

To grant appellant the relief prayed for under the facts found would be to aid it in maintaining a public nuisance, a crime under the laws of this State.

It follows that, even if appellant's contention that appellees had no authority to abate said public nuisance is correct,—a question we need not and do not decide,—the conclusions of law are not erroneous. Judgment affirmed.

**JORDAN ET AL. v. THE INDIANAPOLIS WATER
COMPANY.**

[No. 19,904. Filed June 20, 1902. Rehearing denied October 28, 1902.]

LANDLORD AND TENANT.—Lease.—Water Privilege.—For a certain yearly rental a water company contracted with B to furnish water during certain months in the year, and when not needed for certain hydraulic purposes. B was to provide a trunk in the bank of the canal, with a stop-gate. The company did not agree to keep the canal in repair. It was further provided that B should not be liable for rent if the pond created by the water taken should be declared a nuisance, if any intervening owner interfered with the maintenance of the trunk across his land, or

159	337
162	486
159	337
164	537
159	337
166	128

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if the water company was unable to furnish water. *Held*, that the contract was not a license, a mere unenforceable option to draw water, but a lease founded on good consideration, and that B was liable for rent if through her own fault she failed to take water. *pp.* 338-344.

CONTRACT.—*Mutuality.*—It is enough to give mutuality to a contract that is entire in its character, if there is a consideration on both sides for its performance. *pp.* 344-346.

LANDLORD AND TENANT.—*Lease.*—*Water Privilege.*—*Assignment.*—In a lease granting the privilege to draw water from a canal, a covenant to pay rent runs with the land, and an assignee of the lease is liable for the rent. *p.* 346.

TRIAL.—*Evidence.*—*Instruction.*—In an action on a contract, evidence from which abandonment might be inferred is no reason for instructing on that subject, when no such issue was raised by the pleadings. *p.* 347.

PLEADING.—*New Matter.*—*Supplemental Complaint.*—*Waiver.*—Where an amended complaint is filed which upon its face shows that it contains supplemental matter, the filing of a demurrer or an answer thereto will be held to be a waiver on the part of the defendant of an objection that the new matter set up should have been incorporated in a supplemental complaint. *pp.* 348, 349.

LANDLORD AND TENANT.—*Assignment of Lease.*—*Lessee's Liability for Rent.*—A lessor's consent to an assignment of a lease by the lessee does not relieve the lessee from an express covenant to pay rent. *pp.* 350-353.

From Marion Superior Court; *Vinson Carter*, Judge.

Action by the Indianapolis Water Company against Arthur Jordan and others. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1337j, subdivision 2, Burns 1901. *Affirmed.*

R. W. McBride, C. S. Denny, S. N. Chambers, S. O. Pickens and *C. W. Moores*, for appellants.

Albert Baker and *Edward Daniels*, for appellee.

GILLET, J.—Appellee brought this action to recover four instalments of rent that it claimed were due it for the privilege of tapping a certain artificial waterway, known as the Indiana Central Canal, and drawing water therefrom sufficient to fill and maintain a certain pond during the ice gathering season.

It is averred in the amended complaint that appellee and appellant Cynthia Butsch executed a written contract, on

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the 1st day of November, 1884, a copy of which is set out in the body of such complaint. The contract recites that the company, "in consideration of the rents, covenants, and agreements hereinafter mentioned," "hath demised and leased, and by these presents doth demise and lease" unto said Cynthia Butsch, for and during the term of five years from the date of the contract, "the right to draw sufficient water from the Indiana Central Canal" to fill and maintain her ice pond, that is particularly described, subject to certain specified conditions. These conditions are: That the water is only to be drawn during certain months of the year, through a trunk, of specified diameter, that she is to cause to be inserted in the bank of the canal; that she is to construct and maintain at the intake a stop-gate, and, except when drawing water for said pond, to keep the same securely closed and fastened; and that she is to keep the canal embankment secure against injury or damage consequent upon the construction of said trunk and gate. It is further provided in said contract that water shall not be drawn from the canal except when there is water therein not needed for certain hydraulic purposes. It is expressly provided by said agreement that the company does not engage or guarantee that there shall be any surplus water, and it is stipulated that it is not to be liable by reason of any non-repair of the canal or break therein, or for other causes of an insufficient supply of water. The contract then recites that said Cynthia Butsch covenants and agrees "to pay for the supply of water to be drawn by" her "from said canal, for the use of said ice pond, the sum of \$1,000 per annum," payable semiannually, "during the continuance of this lease." It is then provided that if any intervening owner of property requires her to remove the trunk from the head of the mill-race, immediately east of the pond, or if the pond should be declared a nuisance by a court or other competent authority, then she is to be relieved from any further liability for water rent, and the

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contract is to cease to be operative. In the event that there is no surplus water during the season when she would otherwise be authorized to draw the same, the contract provides that she is not to be held liable for the rent for that season; and, in case she is unable to get water for but a part of the ice gathering season, it is provided that the "rent shall be due and payable for the part of the season in which water is furnished in the proportion the time the water is furnished bears to the whole ice season, and no more." In conclusion, the contract provides that "this lease shall not be transferred or assigned without the consent of the" company "first had and obtained."

The complaint further alleged that on the 21st day of October, 1887, the parties to said agreement entered into a written contract for its extension, upon the same terms, until November 1, 1897. A copy of this agreement is also set out in the amended complaint. It is further alleged that on the 10th day of June, 1891, at the request of appellant Butsch, the appellee indorsed upon said extension agreement its consent to the assignment of her rights to appellants, Jordan and Caylor, with the provision that they were not to assign or sublet. It is then alleged that on the same day she executed to them an assignment of said original contract and extension, a copy of which assignment is set out, and that upon said day "under and by virtue of said assignment said Allen Caylor and Arthur Jordan entered into the possession and enjoyment of all of the rights of said Cynthia Butsch, secured by said original contract and extension agreement, and have since possessed and enjoyed the same," and that they thereafter made the payments accruing under said contract, up to and including that of September, 1894, aggregating \$3,000; that during all of the ice seasons from November 1, 1894, to April 1, 1895, and from November 1, 1895, to April 1, 1896, appellee had in its canal, at the mouth of the inlet or trunk mentioned in said contract, surplus water, over and above all

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that was required for said hydraulic uses, and sufficient to fill and keep filled said pond, and that if appellants, Jordan and Caylor, did not take said water during all of said seasons it was only because they did not see fit to open their said stop-gate so that the water might flow into their said pond; that the original contract and said extension agreement have at all times continued in full force, and that appellants, although often requested so to do by appellee, have neglected and refused to pay the instalments of rent due in June and September, 1895, and June and September, 1896, and that they are now indebted to appellee for said four instalments in the sum of \$2,000. The averments of the amended complaint conclude with a general allegation of performance by appellee.

The appellants, Jordan and Caylor, filed a demurrer to the amended complaint. Their demurrer was overruled, and they filed answer in general denial. The appellant Cynthia Butsch filed a special answer, to which a demurrer was sustained, and she then filed answer by way of general denial. A trial resulted in a verdict and judgment against all of appellants. Further questions, that will be discussed during the course of this opinion, were presented by motions for a new trial.

The first objection to the instrument sued on is that it is lacking in mutuality; that it imposed no obligation upon the company, and that the appellant Butsch had a mere option to draw water from the canal, when there was a sufficient supply; and that therefore there was no obligation to pay for a season during which no water was drawn.

Courts are not justified in straining the provisions of contracts in order to uphold them, but the desire of the law to effectuate, rather than defeat, the agreements of parties is wise and just.

We will first consider the claim that the instrument imposed no obligation upon the company. The document is in form a lease, and in its application to the subject

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matter we perceive no reason why it should not so operate. In 1 Platt, Leases, 24, it is said: "The subjects of demise are various, and, generally speaking, comprehend incorporeal as well as corporeal hereditaments. Thus, not only land, but advowsons, corodies, estovers, ferries, fisheries, franchises, rights of common, rights of herbage, rights of way, tithes, tolls, and other things of a similar kind, may be leased for lives or years." "As to what property may be demised, it is a general rule that anything corporeal or incorporeal, lying in livery or in grant, may be the subject of a demise." Taylor, Land. and Ten. (8th ed.), §17. A grant is the method by the common law of transferring the property of incorporeal hereditaments, or such things whereof no livery can be had. 2 Blackstone's Comm., *317. It is doubtless true that there can be no interest in water, wholly disconnected from land, for "water is a movable, wandering thing, and must of necessity continue common by the law of nature." But there are too many cases in the books recognizing the propriety of contracting for water rights as an incident to the proprietorship of land, creating rights appurtenant or in gross, to leave it an open question whether such rights may be the subject of grant.

Except where created by reservation or exception, an easement always lies in grant, actual or presumptive; and, if the interest is of a more permanent character than a mere license, but is nevertheless limited to an interest for a less time than the grantor has in the premises, and a rent is reserved, we take it that the interest is of a leasehold character. *Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124.

We think that the right that was here granted was more than a mere license, for the instrument purported to grant the right to appellant Butsch upon a sufficient consideration, as we will hereafter show, not only to receive a flow of water for a term of years, at certain seasons, and when the water was sufficiently high, but it also burdened the real estate of the appellee by a provision that she should have

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the right to maintain a trunk in the bank of the canal, and the right to maintain a stop-gate; and it impliedly gave her such possession as was necessary to enable her to maintain the bank of the canal against injuries consequent upon putting in the trunk and stop-gate, and to prevent third persons from opening said gate. In *Smith v. Simons*, 1 Root (Conn.) 318, 1 Am. Dec. 48, the facts were that one Flint had executed a writing whereby, for the consideration of £5, he had granted, to those under whom the defendant in that action claimed, the liberty of flowing certain lands for twelve years without restriction, and for eighty additional years during a certain season of each year. The question on appeal was as to whether the contract was a license or a lease that should have been recorded. The court disposed of the whole case in these words: "It is a lease, and without being recorded it is void as to purchasers."

It is not material that the right of possession of appellant Butsch was a right that was limited to such incidental possession as was necessary to enable her to enjoy and protect her incorporeal right. As said by the court, speaking by Cooley, J., in *Morrill v. Mackman*, 24 Mich. 279, 284, 9 Am. Rep. 124: "A tenancy does not necessarily imply a right to complete and exclusive possession; it may, on the other hand, be created with implied or express reservation of a right to possession on the part of the landlord, for all purposes not inconsistent with the privileges granted to the tenant."

What is implied in an express contract is as much a part of it as what is expressed. Bishop, Contracts, §121; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 75 U. S. 276, 288, 19 L. Ed. 349. "The law is a silent factor in every contract." *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87; *Foulke v. Falls*, 91 Ind. 315, 320.

If the instrument is a lease, and we conclude that it is, it follows that there is in the lease an implied covenant for quiet enjoyment granted by appellee. In *Hoagland v.*

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New York, etc., R. Co., 111 Ind. 443, 446, it was said: "That a covenant for quiet enjoyment, and that the landlord agrees to do no such acts as will destroy the beneficial use of the leased premises, is implied in every mutual contract for leasing land, by whatever form of words the agreement is made, is now too well settled to be doubted or shaken. *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680; *Smith v. Dodds*, 35 Ind. 452; *Wade v. Halligan*, 16 Ill. 507; *Streeter v. Streeter*, 43 Ill. 155; *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Maule v. Ashmead*, 20 Pa. St. 482; *Eldred v. Leahy*, 31 Wis. 546; *Wood, Land. and Ten.*, 564."

It is now our duty to consider whether there was an obligation imposed by the contract upon appellant Butsch. Counsel for appellant say: "There is no promise to pay for anything except the water to be had. The agreement is 'to pay for the supply of water to be drawn by said party from said canal for the use of said ice pond.' There is no promise to pay for any rights or any supposed rights, but for water." It is, of course, provided in the contract that there is to be no liability for rent during a season when the water can not be supplied, and for a ratable deduction when water can not be furnished for the entire ice gathering season. We can not, however, assent to the claim that her liability for rent depended upon whether she exercised the privilege of drawing water from the canal. It will not do to "stick in the bark" upon particular language in the contract. The intent of the parties should be gathered from the four corners of the instrument. The granting part of the lease is expressed to be "the right to draw sufficient water from the Indiana Central Canal." The rent is payable in instalments for each season "during the continuance of this lease," and careful provision is made for the abating of the rent when water can not be furnished, or in the event that the pond is determined, by a court or other competent authority, to be a nuisance, or if an intervening

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owner interferes with the maintenance of the trunk across his land. We can not think that the parties would have seen fit to guard so carefully the tenant's liability, in case the contemplated supply of water could not be had, if she was only required to pay in the event that she elected to draw water from the canal.

In *Black v. Woodrow*, 39 Md. 194, 215, it was said: "If the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will be necessarily implied," citing *Churchward v. The Queen*, 6 B. & S. 807; *Pordage v. Cole*, 1 Wms. Saund. 319. To the same effect, *McCartney v. Glassford*, 1 Wash. St. 579, 20 Pac. 423; *Lewis v. Atlas, etc., Ins. Co.*, 61 Mo. 534; *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202; *Mississippi, etc., Co. v. Robson*, 16 C. C. A. 400, 69 Fed. 773. We need not determine whether the doctrine stated is sufficient *per se*, under an instrument like the one in suit, to cause the court to imply an obligation upon the part of the tenant; but such doctrine, which is only another way of stating that the law inclines to a construction that will uphold, rather than to one that renders nugatory, the agreement of the parties, does clearly give added weight to those provisions of the instrument from which the agreement of appellant Butsch can be inferred. In our judgment, there was a covenant upon her part to pay rent for the privilege.

It was not necessary to the validity of the contract that the water company should bind itself that there should be water in the canal, although it did, as we think, impliedly obligate itself to permit the tenant to take all necessary surplus water that should remain after supplying others who had an antecedent claim upon it. The requirement that there must be mutuality in a contract does not mean that every duty imposed upon one of the parties to it must

be based on a correlative obligation to receive the performance of such duty, and discharge the burden that devolves upon him under the contract in case such duty is performed. It is enough to give mutuality to a contract that is entire in its character, if there is a consideration on both sides for its performance. *Cherry v. Smith*, 3 Humph. 19, 39 Am. Dec. 150. We know of no reason—there being mutual engagements in the lease—why it was not competent for the tenant to agree to pay for having the right to tap the canal in case there was a surplus of water not already devoted to other uses.

The next question is whether the covenant to pay rent runs with the grant, so as to render the assignees of the term liable for the rent while there continued to be a privity of estate between them and the landlord. It was held in *Wheelock v. Thayer*, 16 Pick. 68,—although the court in the course of the opinion intimated some doubt upon the subject,—that the covenant would not run with a grant of a privilege of drawing water from a pond, the court saying: "This covenant could not run with the land, for no land was granted, and to make a covenant run with the land, it is not sufficient that it is of and concerning land." Mr. Angell, in his work on watercourses (6th ed.), §264, note, says of this proposition: "This doctrine is clearly not supportable." In *Bally v. Wells*, 3 Wils. 25, decided in 1769, it was said: "When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is in a manner annexed and appurtenant to the thing demised, and shall run with the land, and shall bind the assignee, although he be not bound by express words."

Whatever may be the law as to other covenants, where the lessee does not attempt to bind his assignee, we think it is to be implied, as a matter of clear equity, that the assignee is bound for the rent so long as a privity of estate exists between him and the landlord. As expressed by Lord Chief Baron Gilbert in a somewhat different con-

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nection, "whosoever has a right to the rent, ought to have all that security for the payment of it, which was taken upon the original security and creation of it." Gilbert, Rents, 143. And see 2 Sugden, Vendors, 582; *Van Rensselaer v. Read*, 26 N. Y. 558; American note to Spencer's Case, 1 Smith's Lead. Cas. (9th Am. ed.), 206. As said in *Carley v. Lewis*, 24 Ind. 23: "A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to, and run with, the land. The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee. *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Vyvyan v. Arthur*, 1 Barn. & Cr. (8 Eng. C. L.) 410." So, in *McDowell v. Hendrix*, 67 Ind. 513, 518, it was said: "The assignees of the lessee are liable to the lessor, his representatives or assigns, for the rent of the demised premises for and during the time such assignees hold said premises, according to the terms and covenants of the lease; 'for though there is no privity of contract, there is a privity of estate which creates a debt for the rent.'" To the same effect, see *Watson Coal, etc., Co. v. Casteel*, 73 Ind. 296.

In this case, as the complaint charged that the appellants, Jordan and Caylor, entered into the possession of the demised premises under the assignment, and have since possessed and enjoyed the same, we think that under the averments of the complaint, they are liable for the rent that accrued during the period sued for.

Because there may have been evidence that might have justified the inference that the contract was abandoned, did not afford a reason why the court should have instructed upon that subject, there having been no affirmative pleading tendering an issue of abandonment. *Mabin v. Webster*,

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129 Ind. 430, 28 Am. St. 199; *Crum v. Yundt*, 12 Ind. App. 308.

Objection is made that the amount of the recovery is too large, in that it included two instalments of rent that fell due after the action was commenced, and before the trial. Appellee, without objection, filed a so-called amended complaint during the trial that distinctly counted upon all of the instalments of rent then due; and appellants, Jordan and Caylor, first demurred thereto, and then framed an issue of fact thereon, while appellant Butsch at once filed answer. No objection was made to the course pursued until evidence was offered as to the last two instalments of rent. The question now presented is whether the objection is available. There can be no doubt as to the general doctrine that an amended complaint, except where some matter as to the running of the statute of limitations is involved, is *prima facie* presumed to speak as of the date of the commencement of the action. But here is an amended complaint that shows on its face that it has brought in supplemental matter, and it is a case, too, where the right to file a supplemental complaint is so obvious that the court, on application, could scarcely have refused leave to file it without an abuse of discretion, except, perhaps, because the application may not have been timely; and yet the appellants proceed to frame an issue upon it, instead of objecting to the filing of it, or moving to reject it upon its being filed. The court, by permitting the filing of an amended complaint that showed on its face that it contained supplemental matter, impliedly gave its permission so to do. The matter properly belonged in the case, and the appellants file answer. It must be that at some stage of the case the right to object to the somewhat anomalous procedure that the record shows was pursued in this case must be held to be waived, and we think that that time must be held to be as soon as the time had gone by when

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appellants could have directly drawn the matter in question by moving to reject the pleading.

In interpreting the provision of our code relative to the filing of supplemental pleadings, we are authorized to look to the practice in chancery before the adoption of the code. *Kimble v. Seal*, 92 Ind. 276; *Barker v. Prizer*, 150 Ind. 4; 21 Ency. Pl. & Pr., 7. In *York v. Stapleton*, 2 Atk. 136, it was said by the Lord Chancellor: "The plaintiff could not properly amend his original bill, by filing new matter which has arisen since the original bill, but ought to have brought a supplemental bill; but then the defendant should have taken the advantage of this defect in form, by a demurrer, and it is too late to make the objection after they have answered." In 21 Ency. Pl. & Pr., 15, it is said: "It is well settled that where a party fails to note the distinction between an amendment and a supplemental pleading, and improperly resorts to one instead of the other, his adversary will be deemed to have waived the objection if without seasonably making any objection he proceeds in the cause as if the proper pleading had been filed." To the same effect, see *Seattle, etc., R. Co. v. Union Trust Co.*, 24 C. C. A. 512, 79 Fed. 179; Foster, Fed. Pr. (3d ed.) §165. See, also, *Farrington v. Hawkins*, 24 Ind. 253. Although Mr. Justice Story, in his work on Equity Pleadings (9th ed.), does not deal with the precise proposition that is now before us, yet, at §528 of that work, he clearly recognizes the doctrine, as the objection is purely one of form. He says: "Defects, for want of form, must ordinarily be taken advantage of by demurrer, assigning the defect of form as a special cause; for, generally the court will not listen to such objections at the hearing, if the case stated is such that the court can properly proceed to a decree." As our practice does not recognize the right to file a special demurrer for want of form, we regard the filing of a general demurrer, or the filing of an answer as to the merits, as a waiver of the objection that the new matter

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was not incorporated in a supplemental pleading filed by leave of court.

But one question remains, and that is as to the liability of appellant Butsch after the assignment of the lease to her co-appellants. The general rule is that the assignment of a lease by a tenant does not relieve him from his express covenant to pay the rent, although the landlord may accept a part of the rent from the assignee. *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 35 N. E. 820, 37 Am. St. 248; *Harris v. Heackman*, 62 Iowa 411, 17 N. W. 592; *Hunt v. Gardner*, 39 N. J. L. 530; *Drake v. Lacoe*, 157 Pa. St. 17, 27 Atl. 538; *Port v. Jackson*, 17 Johns. 239; *Gerken v. Smith*, 11 N. Y. Supp. 685; *Ranger v. Bacon*, 22 N. Y. Supp. 551; *Bonetti v. Treat*, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151; *Smith v. Harrison*, 42 Ohio St. 180; and see *Edmonds v. Mounsey*, 15 Ind. App. 399.

The general doctrine upon this subject was clearly stated in *Sutliff v. Atwood*, 15 Ohio St. 186, 194, where it was said: "There are two sorts of obligations by which tenants are liable to the lessor, viz.: those which arise from express agreement between the parties, and such as are implied. The latter are such as the law raises from the relation of the parties, in the absence of any agreement between them on the subject. The liability of the lessee, in respect to the latter, will be discharged by an assignment with the assent of the lessor, for thereby, the privity of estate, upon which it depends, is destroyed, and the implied covenant or agreement canceled. But the liability of the lessee, arising from express contract, is so permanently fixed during the whole term, that no act of his own can absolve him from the lessor's demands in respect to it. An assignment with the lessor's concurrence, and his subsequent receipt of rent from the assignee will be ineffectual for this purpose. The lessor, where there is an express agreement of the lessee, may sue, at his election, either the lessee or the assignee, or, may pursue his remedy against both at the same time,

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though he can have, of course, but one satisfaction. *Mills v. Auriol*, 1 Smith's L. C. 913; *Thursby v. Plant*, 1 Wms. Saund. 241, note 5; Platt, Covenants, side pp. 490, 491, 494. But, though both are thus liable to the lessor, yet the ultimate liability, as between themselves, can not depend upon which of the two he may, from interest or caprice, elect to pursue to the satisfaction of his demand. The estate is the consideration which the lessor furnished for his demand for rent, and from which it was expected to issue. The privity of estate between the lessor and lessee, and upon which the personal liability of the latter was bottomed, having ceased, and by the assignment passed to the assignee, the latter, as between himself and the lessee, in the absence of any agreement, is to be regarded as primarily liable for the rent, and the personal liability of the lessee as collateral thereto. The lessee is liable in the nature of a surety for the assignee during the continuance of his interest, and, although not bound by an express promise, yet the law imposes a duty upon him to perform the covenants while he enjoys the estate. *Smith v. Peat*, 9 Exch. 161; Taylor, Land. and Ten., §448; *Main v. Feathers*, 21 Barb. 646; *Burnett v. Lynch*, 5 B. & C. 289, 8 Dow. & R. R. 368; *Humble v. Langston*, 7 Mees. & W. 530; *Wolveridge v. Stewart*, 1 C. & M. 659, 3 Moore & S. 569, 30 Eng. C. L. 316."

Of course, if there was an actual novation, the assignor would be discharged, but we do not think that the answer of said appellant makes out such a case. The agreement of appellee that the contract might be assigned was not made with her co-appellants, but with herself. After the consent was granted, she still continued to be the tenant, but even if this were not true, we do not think that the consent indorsed upon the lease shows an affirmative intent to release her. Counsel for said appellant plead a number of acts done by appellee, and conclude by alleging that it "accepted" her co-appellants as tenants instead of her. We

think that the theory of this answer is that the acts alleged worked a novation, and that the statement mentioned is in the nature of a legal deduction from the specific acts pleaded. The acts pleaded did not work a release, and we are, of course, bound to disregard the conclusion.

An analogous question was presented in *Frank v. McGuire*, 42 Pa. St. 77, 82, where it was said: "Then, were the affidavits sufficient? Taken together, they aver in substance that the rent for the first quarter was paid, that after the first quarter of the lease had expired, the premises were rented to other tenants, whom the plaintiff accepted as tenants in the place and stead of Albright, the lessee, and that they attorned to him. They also aver that before the expiration of the lease, the plaintiff accepted the keys and took possession of the demised premises. By the express terms of the lease the rent was payable quarterly. The affidavits doubtless show a defense against any claim for the rent of the first and last quarters. But the judgment was for the rent of the second and third quarters, and the question is, whether the averments are sufficient to prevent a recovery of that. It is surely not necessary to cite cases to prove that a tenant is bound by his express contract to pay rent, even after he has assigned the term with his landlord's assent, and though the landlord has accepted the assignee as his tenant, and received rent from him. A landlord may, indeed, accept a surrender even by parol, and if he does, the term is gone into the reversion and the rent ceases. *Greider's Appeal*, 5 Barr. 422, 425; *M'Kinney v. Reader*, 7 Watts 123. But is a surrender averred in this case? Not in terms, certainly, and not even inferentially, unless it be in the allegation that the plaintiff accepted and received De Grath & Co. as tenants in place and stead of John S. Albright, and that they attorned to him. But if he received from them rent reserved under the lease, or accepted them as tenants, it must have been in place and stead of the original lessee, and that would not

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amount to a surrender of the term: *Dewey v. Dupuy*, 2 Watts & Serg. 553. If the defendant intended to aver that there was a surrender, it was easy to assert it, so as to leave no doubt. While his affidavits are to receive no strained construction against him, it is not unreasonable to require that he shall not leave in doubt what it was so easy to set at rest. All which is averred may have taken place, and yet there have been neither surrender nor release." There were facts shown on the trial that might, perhaps, have justified the conclusion that it was the intent to release said appellant Butsch; but they were not pleaded in her answer, and were therefore not in issue.

We have now considered the various questions presented by the demurrers and the motions for a new trial, and we find no error. The judgment of the trial court is affirmed.

THE PEOPLE'S NATIONAL BANK OF PRINCETON
v. STATE, EX REL. EMERSON ET AL.

[No. 19,796. Filed October 29, 1902.]

APPEAL.—Failure of Appellee to File Brief.—Confession of Error.—

Where the appellee, within the time allowed, fails to file a brief in support of the judgment assailed, such failure may be regarded as a confession of error, and the cause reversed without considering the appeal on its merits.

From Vanderburgh Superior Court; *G. A. Cunningham*, Special Judge.

Mandamus by the State on the relation of Alexander Emerson and another to compel an inspection of bank books for the purpose of taxing deposits. From a decree for plaintiffs, defendant appeals. *Reversed.*

J. H. Miller and *J. E. McCullough*, for appellant.

DOWLING, C. J.—This is a proceeding by the appellees, who were, respectively, the assessor and the auditor of Gibson county, for a writ of mandamus to compel the appellant

159	353
162	568
162	696
159	353
162	568

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to grant to them an inspection of its books showing the names of its depositors, and the amounts to their credit on April 1, 1899. The action was brought in the Gibson Circuit Court in September, 1899, and a change of venue was taken to the superior court of Vanderburgh county. An alternative writ was issued, to which the appellant made its return in nine paragraphs; the first being a general denial, and the others setting up special matters of defense. Demurrers to all of the special answers were sustained. The cause was tried upon the issue made by the general denial, and judgment directing the issuing of a peremptory writ of mandate was rendered.

The defendant below appealed, and filed its transcript in this court on the 6th day of March, 1902. Nine errors were properly assigned. On June 2, 1902, printed briefs for the appellant were filed, in which the supposed errors of the trial court were fully discussed. Two hundred days have elapsed since the submission of the cause, and, although the questions raised by the assignment of errors and presented by counsel for appellant in their briefs are important ones, no brief has been filed on behalf of the appellees, and no attention has been given by them to this appeal.

In view of the failure of the appellees to controvert any of the grounds upon which a reversal of the judgment is demanded, we feel justified in regarding their silence and neglect as a confession of error; and under the rules of this court as announced in *Berkshire v. Caley*, 157 Ind. 1, and *Neu v. Town of Bourbon*, 157 Ind. 476, without intending to express any opinion upon the questions of law presented in the record, we reverse the judgment at the cost of the appellees, but without prejudice to either party. Cause remanded to Vanderburgh Superior Court for further proceedings.

COX v. PELTIER.

[No. 19,858. Filed October 29, 1902.]

ASSUMPSIT.—Complaint.—Implied Promise to Pay.—A complaint alleging that a burial casket was furnished and certain services rendered "at the special instance and request of defendant," sufficiently alleges an implied promise to pay the reasonable value thereof. pp. 356, 357.

SAME.—Parol Promise.—Statute of Frauds.—An unconditional parol promise of a person to pay for goods furnished at his special instance and request to a third party is not violative of the statute of frauds, which requires that a promise to answer for the debt of another shall be in writing. p. 357.

TRIAL.—Recall of Jury Pending Deliberations.—The provision of §550 Burns 1901, that any additional instructions or information given the jury upon their being recalled by the court pending their deliberations, "shall be given in the presence of, or after notice to, the parties or their attorneys," is mandatory. pp. 361, 362.

SAME.—Recall of Jury Pending Deliberations.—Harmless Error.—Where the court recalls the jury pending their deliberations, and in the absence of a party or his counsel, in violation of §550 Burns 1903, lectures them for their failure to agree, the error is harmless if the evidence clearly shows that the verdict of the jury was right. pp. 362, 363.

From Allen Superior Court; *J. H. Aiken*, Judge.

Action by James C. Peltier against Patrick E. Cox. From a judgment for plaintiff, defendant appeals. *Affirmed.*

Wilmer Leonard and Elmer Leonard, for appellant.
W. P. Breen and John Morris, Jr., for appellee.

JORDAN, J.—This appeal comes on an order of transfer from the docket of the Appellate to this Court as an undistributed case. The action was instituted below by appellee to recover of appellant the price of a burial casket and box, and for services rendered as an undertaker at the burial of one Mrs. C. F. Tritchler. On a trial before a jury appellee was awarded a verdict for \$75, and over appellant's motion for a new trial judgment was rendered for that amount.

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The first contention of appellant's counsel is that the complaint is insufficient on demurrer. It is alleged therein that the plaintiff on June 3, 1896, at the special instance and request of the defendant Patrick E. Cox, furnished a burial casket and box and rendered undertaker's services at the funeral of Mrs. C. F. Tritchler, which casket and box and services so rendered were reasonably of the value of \$75; that said sum is due, and remains wholly unpaid, etc. A bill of particulars is filed with the pleading. It is insisted that the complaint is bad for the following reasons: (1) There is no averment that the defendant promised to pay for the goods furnished and services rendered, or that he in any manner bound himself to pay for the same; (2) there is nothing to disclose that the plaintiff extended credit to the defendant, or looked to him for the pay; therefore it is claimed that under the complaint the case falls within the statute of frauds.

The pleading discloses that appellant is indebted to the appellee for goods furnished and services rendered at the special instance and request of the former. Under the alleged facts there was at least an implied promise upon the part of appellant to pay the reasonable value of the goods furnished and services rendered. If he ordered or requested the goods to be furnished and the services to be rendered as averred, it is immaterial for what legitimate purpose, or for whose use, they were intended. *Rend v. Boord*, 75 Ind. 307.

It is certainly true in a legal sense that where goods are furnished by one party upon the order, or at the special instance and request, of another, that the person who gives the order or makes the request that they be furnished for the use of some third party will be considered as the purchaser, and not the party to whom the goods are furnished in pursuance of such order or request. The debt incurred thereby will be that of the person making the order or request that the goods

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be furnished, and he alone will be liable. An unconditional parol promise of a person to pay for goods furnished at his special instance and request to a third party is not violative of the statute of frauds, which requires that a promise to answer for the debt of another shall be in writing. The complaint was sufficient to require appellant to answer.

The following is a summary of the facts, which are clearly and fully established by evidence in the record: The wife of C. F. Tritchler, a resident of Fort Wayne, Indiana, died at said city on June 2, 1896. At the time of her death her husband was in the employ of appellant, the latter being engaged in the plumbing business at that city. It is shown that Mr. Tritchler continued in appellant's employ for some two years after the death of his wife. On the day following the death of Mrs. Tritchler, her said husband, together with appellant, went to appellee's place of business in the city of Fort Wayne, he being engaged in conducting the business of an undertaker. The purpose of their going to see appellee was to have him furnish a casket and box for the burial of the deceased wife, and to procure him to take charge of the funeral, and ship the corpse to Defiance, Ohio, at which place the remains were to be buried. Appellee and appellant were acquainted with each other, but appellee had no acquaintance with Mr. Tritchler, the husband. The latter, it seems, selected a burial casket at the price fixed by appellee. After everything had been selected, appellant ordered or directed appellee to charge the bill to him, as Tritchler was in his employ, to which appellee consented; and thereafter, in pursuance of appellant's order, he furnished and delivered the casket and box for the burial of Mrs. Tritchler, and performed the usual and necessary services at her funeral as an undertaker; all of which it was shown were worth at least \$75. It appears as a part of the same transaction or arrangement appellee was directed to furnish or have on

hand a carriage to convey the family of the deceased from the residence to the railroad station, all of which he did. Sometime after the funeral a bill for the casket, box, and services rendered was made out, and a Mr. McMullen, who was in the employ of appellee, presented the same to appellant for payment. The latter, as shown, made no objection to the bill, but agreed to pay it at a later date, giving as an excuse for not paying the bill at the time that "he was short of funds." McMullen testified that several times thereafter he presented this same bill to appellant, and that each time he promised that he would pay it, giving some excuse for not meeting the bill at the time it was presented. On several occasions appellant promised appellee that he would pay the bill. At one time he requested appellee to wait until he (appellant) received some money from a judgment which he expected to recover in an action which he had pending in court in Whitley county. On another occasion he promised to pay the bill as soon as he obtained the money owing to him upon a contract which he had for some work to be performed at Decatur, Indiana.

It was shown upon the trial that appellant was indebted to Tritchler, the husband, during the whole period he remained in his employ, which was for quite a period before the death of his wife, and, as previously stated, for about two years after her death. On a settlement between Tritchler and appellant, at some time before the commencement of this suit, the latter deducted out of the amount due from him to the former the full sum due to appellee for the casket, box, and the services in question, and also \$2 for the carriage furnished at the funeral. This carriage, as it appears, was ordered by appellee from a firm known as Powers & Barnett, who were engaged in the livery or transfer business in the city of Fort Wayne. Appellee usually collected the bill for carriages furnished by this firm at funerals as a part of the undertaker's charges, but he would do so, however, under an arrangement which he had to

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act for them as their agent in such matters. After the funeral of Mrs. Tritchler, it appears that appellee informed Powers & Barnett that appellant was to pay the bill for the carriage hired. Thereafter Mr. Barnett, of that firm, on several occasions presented the bill of \$2 for the hire of the carriage to appellant, and each time the latter promised to pay it. At one time when Barnett presented the bill to appellant he told him that if he did not pay it he would demand the bill of Tritchler. Thereupon appellant requested him not to do so as he had already deducted the bill from Tritchler's wages.

The amount for the carriage, it appears, forms no part of the claim upon which appellee recovered in this action. There is evidence to show that appellee charged the account for the casket and services rendered alone to appellant, as directed by the latter, and at no time did he present the bill to Tritchler, or in any manner looked to him for the payment thereof. Appellant complains of several rulings of the court in admitting and in refusing to exclude evidence, and in giving, and in refusing to give, certain instructions. Upon an examination in respect to these questions we conclude that the court in its charge to the jury fully presented the theory of both parties in this action, and the instructions, when considered as a whole, may be said to have fully advised the jury in regard to the law applicable to the case under the issues and the evidence, and are as favorable to appellant as he has any right to demand. The rulings of the court of which appellant complains in relation to the admission and exclusion of evidence are not open to the objection urged, and if any of them could be said to be erroneous, they would not, for the reasons hereinafter stated, justify us in disturbing the judgment of the lower court.

The alleged error upon which counsel for appellant state that they "particularly rely for a reversal" is based on facts as the same are exhibited by a special bill of exceptions. This bill appears to have been filed on December 24, 1900,

but as to when it was presented to the trial judge, or by him signed, is left as a matter of conjecture; and this infirmity in the bill, together with others, is severely assailed and criticised by counsel for appellee. The jury trying the cause, it seems, was charged by the court, and retired to deliberate upon a verdict, about ten o'clock in the forenoon of December 14, 1900. About eight o'clock p. m. of the same day, and before the jurors had agreed upon a verdict, the judge, without any request from them to be further advised on any point or points of law involved in the case, ordered the bailiff to bring the jury into court, which was accordingly done, and thereupon, in the absence of both parties and their respective counsel, and without the consent of either party, and without any notice to or knowledge of either party or their counsel, he inquired of the jurors if they had agreed upon a verdict, and, on receiving an answer in the negative, he then addressed some remarks to the jurors, whereby he threatened or admonished them in regard to what he would do about keeping them together for a certain length of time unless they agreed upon a verdict. After being so lectured by the judge, the jury, at his direction, retired to their room for further deliberation, and in the course of an hour and thirty minutes they agreed upon a verdict, which fact was reported to the judge, and the latter directed that they be brought into court, which was accordingly done, and there, in the absence of both parties and their attorneys, and without notice being given to either party or his counsel, the court received the verdict of the jury. Following these statements in the bill of exceptions it is further stated therein that "To the action and conduct of the court the defendant at the time excepted." The bill of exceptions then concludes as follows: "And now, as soon as defendant was informed of said facts, for the purpose of presenting the questions of law arising on the alleged misconduct of the court and of said bailiff, the defendant now tenders this, his bill of exceptions numbered one, and prays

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the same may be signed, sealed, and made a part of the record in this cause, which is done this — day of December, 1900. John H. Aiken, judge of the superior court of Allen county.”

It will be observed that the exact date when the bill was presented to or signed by the trial judge is not shown, and counsel for appellee contend that by reason of this fact the bill is not available for the purpose intended. The conflicting statements in the bill certainly leave the question as to whether appellant was present in court in person or by counsel at the time the court addressed its remarks to the jury, and at the time the verdict was returned and received, somewhat confused or in doubt. It is not the duty of this court on appeal to settle conflicting statements in bills of exceptions. If the defendant was not present in person or by counsel at the time or times as stated in the bill, then it certainly can not be true that he at the time excepted to the action and conduct of the court as therein declared. If the exception was taken by the defendant at the time as stated, then it may certainly be presumed that the same was reserved by him in person or by some one authorized to appear in court at the time in his place and stead.

Passing over, as we do, however, the several infirmities imputed to or urged by counsel for appellee against the bill of exceptions, and giving the action of the court in question consideration, we are constrained, under the circumstances, to say that the action or conduct of the trial court in addressing the jury, and in receiving the verdict, as shown, in the absence of the parties and their counsel, and without their consent, and without any notice to them or their attorneys, and without any effort or attempt being made to apprise them of what the court was proposing to do,—no excuse whatever being shown in the bill of exceptions for the court's taking such actions or steps in the absence of the parties and their counsel,—is justly open to criticism and complaint. Section 550 Burns 1901 provides: “After

the jury have retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their attorneys." The provisions of this statute in regard to the presence of the parties, or notice to them or their counsel, is held not to be merely directory, but mandatory. *Jones v. Johnson*, 61 Ind. 257; *Blacketer v. House*, 67 Ind. 414.

While, perhaps, the question under the facts herein does not bring the case within the strict or express letter of the above section, nevertheless it certainly falls within the spirit thereof. A trial court is not justified in threatening a jury, and thereby attempting to coerce them into an agreement; still the court may impress upon them the fact that by reaching an agreement in the particular case, if they consistently can, under the law and the evidence, they will subserve the interests of both the public and the respective litigants. Certainly the action of the court in receiving the verdict under the particular circumstances was, to say the least, an irregularity, not in harmony with the due administration of justice. The hour at which it was received was an unusual one,—being in the night-time; but if the court deemed it proper to receive the verdict during the night, then some arrangements ought to have been made with the parties or their counsel by which they might have been apprised of the agreement of the jury, and thereby have availed themselves of their right to be present in court at the time. By §553 Burns 1901, each party in an action is given the right on the return of a verdict to poll the jury. This statute evidently contemplates that the parties will be present in court in person or by counsel upon the return of a verdict, and avail themselves of this right. Not only may they exercise such a right on the return of a verdict, but it is their privilege to exercise any others to which they

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may be entitled. *Rosser v. McColly*, 9 Ind. 587. Of course, the right to be present at the return of a verdict is one which a party may voluntarily waive or abandon.

While we are of the opinion, as previously said, that the action of the court in question is justly subject to criticism, and if the judgment, in consideration of the evidence before us, was not clearly right, such conduct might afford grounds for a reversal; but in this case the court's action in the matter will not warrant us in disturbing the judgment for the plain reason that there is competent evidence in the record from which it is clearly and satisfactorily shown that by the judgment below a correct or right result has been reached, and justice thereby has been fully subverted. In fact we are unable to discover how the jury could have decided otherwise than they did, unless they had arbitrarily rejected the evidence given in behalf of appellee, and accepted alone that which appellant gave as a witness in his own favor.

Where, as in this appeal, it clearly and satisfactorily appears that the merits of the case have been fairly tried and determined, and a right result reached, this court, under the rule recognized by §670 Burns 1901, must disregard intermediate errors occurring at the trial, and sustain the judgment. This rule has been repeatedly observed and enforced by the decisions of this court. See cases collected under §670, *supra*.

For the reasons stated, the judgment should be, and therefore is, affirmed.

DREW v. TOWN OF GENEVA.

[No. 19,757. Filed October 30, 1902.]

MUNICIPAL CORPORATIONS.—*Lien for Sidewalk Improvements.*—*Complaint.*—The contract between a town and a contractor for the improvement of a sidewalk is not the foundation of an action to foreclose the statutory lien against abutting property for such improvement, and the failure of the complaint to aver that the contract was in writing is not an omission to state a fact essential to plaintiff's cause of action. *pp. 364, 365.*

APPEAL.—*Precipe.*—*Transcript.*—*Bill of Exceptions.*—Where the precipe filed by appellant directed the clerk to "prepare and certify a full, true, and complete transcript of the following proceedings, papers on file, judgment and decree" in the cause, the action of the clerk in certifying the original bill of exceptions was unauthorized, and the same is no part of the record on appeal. *pp. 365, 366.*

From Jay Circuit Court; *J. M. Smith*, Judge.

Suit by the town of Geneva against William Drew. From a decree for plaintiff, defendant appeals. *Affirmed.*

F. H. Snyder, for appellant.

J. W. Headington and *O. S. Whiteman*, for appellee.

JORDAN, J.—Appellee, an incorporated town situated in Adams county, Indiana, commenced this action to recover of appellant, an abutting owner, the cost of paving a certain sidewalk in said town. The improvement in controversy was made in pursuance of §§4394, 4396 Burns 1901, and this action was instituted under §4397 of the same statute. The venue was changed from the Adams to the Jay Circuit Court, wherein, on a trial before the court, appellee was awarded \$35.90, and a decree foreclosing the statutory lien for that amount. The appeal from that judgment comes to this court by reason of appellant's contention that the evidence discloses that the ordinance under which the paving of the sidewalk was made and the proceedings thereunder are invalid.

The errors assigned are (1) that the complaint does not state facts sufficient to constitute a cause of action; (2)

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that the court erred in overruling the motion for a new trial. The infirmity imputed to the complaint is that it fails to aver that the contract between appellee and the party to whom the work of paving the sidewalk was let was in writing. The pleading does, however, disclose that the work was let as provided by the statute, and that appellee entered into a contract with the person therein named for the performance of said work. It is true that it is not expressly alleged that such contract was in writing. While §4396, *supra*, does not in express terms provide that there shall be a written contract between the town and the contractor for the performance of such work, nevertheless the proper town authorities, in the orderly exercise of the powers invested in them in such proceedings as the one at bar, ought to require that the agreement of the person to whom the work is let should be reduced to writing. The contract, however, between the town and the contractor in proceedings like this is not the foundation of the action foreclosing the lien, and the failure of the complaint to aver that the contract therein mentioned was in writing is not an omission to state a fact essential to appellee's cause of action. An examination of the complaint discloses that it is substantially a copy of one held to be sufficient in *Powers v. Town of New Haven*, 120 Ind. 185. It also substantially follows the form of complaint given in *Thorn-ton, Mun. Law* (3d ed.), 485.

All the other questions discussed by counsel for appellant depend for their solution entirely upon the evidence. By a written preceipe which is appended to the transcript in this appeal, and which was made under and in pursuance of the provisions of §661 Burns 1901, appellant, by his counsel, directed the clerk of the lower court to "prepare and certify a full, true, and complete transcript of the following proceedings, papers on file, judgment, and decree, to wit." Here follows an enumeration or mention of the papers, documents, and entries in the cause which the clerk

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is directed to transcribe and certify, such transcript to be used, as stated, on appeal to the Supreme Court. Among the documents mentioned in the precept which the clerk was directed to transcribe for the purpose of the appeal is the following: "The bill of exceptions." It appears, however, that the clerk has not complied with the written directions of appellant. At least he has not so far as the same required him to certify a transcript of the original bill of exceptions embracing the evidence, which appears to be the only bill filed in the case. Instead of certifying a transcript thereof as directed, the clerk has bodily certified to this court the original bill itself; hence, under the circumstances, when ruled by the decisions in *Johnson v. Johnson*, 156 Ind. 592, and *Chestnut v. Southern Indiana R. Co.*, 157 Ind. 509, we are compelled to hold that the act of the clerk in certifying such original bill was unauthorized, and consequently the evidence is not a part of the record. In the appeal of *Chestnut v. Southern Indiana R. Co.*, *supra*, we said: "Under the directions given to the clerk in the precept in question it became his duty to certify to this court a transcript or copy of the original bill of exceptions containing the evidence and the rulings of the court in the admission or exclusion of testimony, and his act in certifying the original bill was, under the statute, unauthorized."

The evidence not being properly before us, we must, without consideration of their merits, dismiss the several questions depending for determination upon the evidence.

Judgment affirmed.

Hershberger v. Kerr.

HERSHBERGER v. KERR.

[No. 19,819. Filed October 30, 1902.]

APPEAL.—*Pleading.*—*Amendment.*—*Review of Original.*—The Supreme Court will not review a ruling on an original paragraph of complaint which has been superseded by an amended complaint. *p. 367.*
SAME.—*Bill of Exceptions.*—*Review.*—A bill of exceptions not signed before filing, and not filed within the time allowed after term, can not be considered on appeal. *p. 368.*

From Madison Superior Court; *H. C. Ryan*, Judge.

Action by Byard Hershberger against James V. Kerr. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. R. Thornburg and *D. L. Bishopp*, for appellant.

M. A. Chipman, *S. M. Keltner* and *E. E. Hendee*, for appellee.

HADLEY, J.—Action for the recovery of money. The record shows that appellant on April 17, 1899, filed in the clerk's office his complaint, which is not set out, but is referred to by "here insert," to which complaint a demurrer was sustained; and on May 23, 1899, appellant filed an amended complaint in one paragraph, to which a demurrer was overruled.

The assignments of error in this court are, (1) that the court erred in sustaining the demurrer to the plaintiff's complaint; (2) that the court erred in overruling appellant's motion for a new trial. The first assignment presents no question, because the filing of an amended complaint carried the original complaint and rulings thereon out of the record (*Weaver v. Apple*, 147 Ind. 304; *Indianapolis, etc., R. Co. v. Center Tp.*, 143 Ind. 63), and the ruling on the demurrer to the amended complaint was in appellant's favor, for which he cannot be heard to complain.

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Appellant is equally unfortunate in his second assignment. He states fourteen reasons for a new trial, every one of which depends for solution upon the evidence, and the evidence is not in the record. It is shown that the motion for a new trial was overruled and final judgment rendered on October 24, 1899, and that ninety days were given in which to file a bill of exceptions. We know that the October term of the Madison Superior Court expired on the Saturday preceding the first Monday of December, 1899. §1426f Burns 1901. After the term the bill of exceptions could be filed only within the time allowed by the court. The record shows that it was not filed until September 26, 1900, about eight months after the time limit for filing had expired, and was not signed by the presiding judge, nor presented to him, until October 17, 1900, twenty-one days after it had been filed as a bill of exceptions. For at least two good reasons, the bill of exceptions, embracing the evidence, is not in the record. See *Utterback v. State*, 153 Ind. 545, 548; *Makepeace v. Bronnenberg*, 146 Ind. 243, 249; *Chicago, etc., R. Co. v. Cason*, 151 Ind. 329.

Judgment affirmed.

THE CITIZENS STREET RAILROAD COMPANY v.
BATLEY.

[No. 19,852. Filed October 30, 1902.]

STREET RAILROADS.—Defective Trolley Wire.—Injury to Traveler.—Special Finding.—In an action by a traveler in a street against a street railway company for injuries caused by a broken trolley wire, alleged to have been negligently kept in use after it had become crystallized and weak, a special finding that the wire had not been subjected to any more than ordinary usage of wires "at that place" is not equivalent to a finding that the wire in question was only subjected to ordinary usage. pp. 369, 370.

SAME.—Defective Trolley Wire.—Negligence.—In an action for an injury caused by a broken trolley wire, the jury might be able to find that the company was negligent in keeping in use a wire after it

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had become crystallized and weak, although there was no evidence as to what caused the wire to break at the "particular time and place," and no evidence as to any method by which to ascertain in advance "when" or "where" such wire might break. pp. 370, 371.

STREET RAILROADS.—*Defective Trolley Wire.*—*Special Finding.*—In an action against a street railway company for injuries caused by a broken trolley wire, a finding of the jury that the wire broke "without warning," will be held to mean without warning to plaintiff. p. 371.

From Hancock Circuit Court; C. G. Offut, Judge.

Action by Josephine Batley against Citizens Street Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

F. Winter, W. H. Latta, Ephraim Marsh, W. W. Cook and S. O. Pickens, for appellant.

C. E. Barrett, E. A. Brown, Ralph Bamberger, Isidore Feibleman, A. V. Hodgin and J. E. Kepperley, for appellee.

GILLET, J.—The appellee received an injury by reason of a trolley wire of appellant falling upon her while she was using a street as a traveler. Her complaint charges, among other things, that through the negligence and carelessness of appellant said wire had become crystallized and weak, and that by reason thereof it broke, and in falling came in contact with her person. There was a verdict in favor of appellee, and in connection therewith the jury answered a number of interrogatories that had been submitted to them. Appellant moved for judgment upon these answers, but the court rendered judgment upon the general verdict. Appellant has assigned as error the action of the court below in overruling its said motion.

The general rules of law relative to such motions have been often stated by this court. Without reiteration, we cite the case of *McCoy v. Kokomo R., etc., Co.*, 158 Ind. 662, upon this subject.

It is our judgment that the answers to the interrogatories are not such as to overthrow the general verdict. One

difficulty about many of the interrogatories propounded is that they are of an abstract character, and do not ask for the particular facts of the case in hand. The date of appellant's injury was August 8, 1898. The wire in question was put in place in the latter part of the year 1897, or the first part of the year 1898. The fourteenth interrogatory reads as follows: "Does the evidence show that these wires were subjected to any more than the ordinary usage of wires at that place from the time they were so put in place to the time of plaintiff's accident?" This interrogatory was answered in the negative. This is not equivalent to a finding that the wire in question was only subjected to ordinary usage, for the ordinary usage of wires at that place may have been very great. There is room for the inference that the wire had become crystallized and weak from extensive or hard usage, and that by reason thereof appellant was put on notice of its condition.

The twenty-sixth interrogatory is in the following words: "What caused said wire to break at that particular time?" The next interrogatory reads thus: "What caused said wire to break at that particular place?" The jury found that there was no evidence upon which to base an answer to these interrogatories. It was not material as to what caused the wire to break at the particular moment when appellee was passing under it, and it was not material as to what caused the wire to break at the particular place that it did break. Without being able to affirm why the wire broke at the precise time that it did break, or why it broke at the particular place where it did break, the jury may nevertheless have been able to conclude from the evidence that the wire for some distance and for some considerable time had been crystallized and weak and liable to break, and this would be a sufficient basis for a finding of negligence. We do not think that the answers in question negative the fact that the evidence did not support the averments

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of the complaint as to the substantive charge of negligence referred to.

The tenth interrogatory, to which the jury also returned an answer of "No evidence," is as follows: "What method, if any, has ever been discovered by which to ascertain in advance when or where a wire may or probably will break?" There may have been no evidence of a method by which to ascertain in advance when or where a wire will break, that by reason of crystallization is liable to break at any time and at any place. We think, therefore, that this answer does not overthrow the general verdict. There is a further finding that the wire broke as appellee was passing under it, without warning. This finding does not show whether the wire broke without warning to appellant or to appellee, but, from the connection in which the finding occurs, we think that it may be inferred that it broke without warning to appellee. A person who maintains a wire in the street, subjected to strain, and charged with electricity, after the wire has undergone usage for such a length of time that according to experience it has probably become crystallized, is not, in a strict sense, "warned" of the danger, but is, or rather should be, advised of it.

The interrogatories in question have been framed in rather an artful way, and with a seeming disposition, in some particulars, to avoid bringing out the real facts. There is in the complaint a direct charge of negligence in permitting a crystallized and weak wire to remain suspended as a trolley wire; but there is no question asked as to whether the wire was crystallized and weak, and the questions, however answered, were not calculated to show that the appellant was not charged with notice, actual or constructive, of such condition. The general verdict affirms these propositions against appellant, and the answers to interrogatories do not lead to the conclusion that the jury has contradicted itself.

There is no error in the record. Judgment affirmed.

 Kreuter v. English Lake Land Co.

**KREUTER ET AL. v. THE ENGLISH LAKE LAND
COMPANY ET AL.**

[No. 19,881. Filed October 30, 1902.]

APPEAL.—*Dismissal for Failure to Join Adverse Parties.*—All parties to a judgment must be made parties in the assignment of errors on appeal therefrom, or the appeal will be dismissed.

From Starke Circuit Court; *G. W. Beeman*, Judge.

Action by Hugh E. Kreuter and others against the English Lake Land Company and others. From a judgment for defendants, plaintiffs appeal. *Appeal dismissed.*

T. E. Howard, J. M. Fuller and H. R. Robbins, for appellants.

J. F. Hanly and W. R. Wood, for appellees.

MONKS, J.—Appellant filed a supplemental petition under §5629 Burns 1901, §4279 Horner 1901, to what was known as the Place ditch proceeding, making the English Lake Land Company and George Schoonover and forty-two other persons parties thereto. Notice of said supplemental petition was given to the nonresident landowners by posting, and to the resident landowners by copy or reading, as required by §5624 Burns 1901, §4274 Horner 1901. Afterwards said supplemental petition was dismissed by the court as an entirety on the motion of the English Lake Land Company, and a final judgment was rendered against appellants.

It is insisted that “this court has no jurisdiction to determine this appeal on its merits because all the parties brought into court by said supplemental petition, forty-four in number, have not been made appellees on this appeal and served with notice.” It is true that only two of said parties, the English Lake Land Company and George Schoonover, have been made appellees in this court. The court dismissed said supplemental petition as to all the

159	372
160	367

159	372
163	400
163	478

159	372
167	76

159	372
170	549

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forty-four parties named therein as parties adverse to appellants. The other coparties with the English Lake Land Company and George Schoonover in the court below were adverse parties to appellants, the same as the said appellees, the English Lake Land Company and Schoonover, and should have been made co-appellees with them in this court, and served with notice of the appeal. *Hutts v. Martin*, 141 Ind. 701; *Moore v. Franklin*, 145 Ind. 344, 346, 347; *Bozeman v. Cale*, 139 Ind. 187; *Ex parte Sullivan*, 154 Ind. 440; *National, etc., Assn. v. Huntsinger*, 150 Ind. 702; *Capital National Bank v. Reid*, 154 Ind. 54; *McClure v. Shelburn Coal Co.*, 147 Ind. 119; *North v. Davisson*, 157 Ind. 610; *Garside v. Wolf*, 135 Ind. 42.

It is clear that unless all the parties adverse to appellants in the court below who were affected by the judgment are made appellees in this court, the case can not be determined upon its merits. *McClure v. Shelburn Coal Co.*, 147 Ind. 119, 122, and cases cited.

Appeal dismissed.

SAUER v. SCHENCK ET AL.

[No. 19,586. Filed May 27, 1902. Rehearing denied October 30, 1902.]

PARTITION.—*Complaint.*—*Advancement to One of Several Heirs.*—In a proceeding for the partition of real estate among heirs, an averment in the complaint that there had been advanced to one of the defendants his full share of the estate, does not put in issue the title of such heir in the common property. pp. 375, 376.

SAME.—*Partition Among Heirs.*—*When Title in Issue.*—In proceedings for the partition of real estate among heirs, no question of title among the partitioners is settled by the decree dividing the property, unless pleadings are specially formed putting the title in issue. p. 376.

From Vanderburgh Circuit Court; *H. A. Mattison*, Judge.

Proceedings supplemental to execution by Dina Sauer against Eberhardt P. Schenck and others. From a judg-

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ment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

W. W. Ireland, for appellant.

J. W. Spencer and *J. R. Brill*, for appellees.

HADLEY, J.—Joseph Schenck died the owner of real estate in Vanderburgh county leaving children, appellant, and appellees, Eberhardt P., Joseph, and Frank Schenck and three others as his only heirs at law.

On July 26, 1898, appellant and her sister Elizabeth Marx, instituted in the Vanderburgh Circuit Court against the appellees herein their suit for partition of the lands inherited from their deceased father; the plaintiffs alleging that they and the defendants, except Eberhardt P. Schenck, were the owners of the land as tenants in common, and each entitled to an undivided one-sixth thereof in severalty; that the defendant Eberhardt P. Schenck had been advanced by his father his full share of the estate. The record does not disclose whether the defendants, or either of them, filed an answer; but such proceedings were had that the court found and decreed that each of the plaintiffs and defendants was the owner and entitled to a share equal in value to one-seventh of the whole, and ordered that the plaintiffs have set off to each of them, in severalty, her share. Certain described parcels were set off to the plaintiffs to have and to hold in severalty and the "remainder of said lands" set apart to the five defendants, including Eberhardt P. Schenck as their five-sevenths in value, without partition. Pending the partition suit, to wit, August 27, 1898, Eberhardt P. Schenck conveyed to his brothers, Joseph and Frank, by quitclaim deed, all of his right, title, and interest, being the undivided one-seventh of the described lands; the expressed intention being "to convey to said grantees all the right, title, and interest of the said Eberhardt P. Schenck in and to the estate real and personal of his father," as one of the heirs at law, for the sum of

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\$900. It does not appear from the record whether this conveyance was made before or after the order of partition. It was, however, made before the filing and confirmation of the report of partition. On April 25, 1899, appellant recovered a judgment against her brother Eberhardt, and issued execution thereon May 4, 1899, which was returned *nulla bona* May 10, 1899. This proceeding is supplemental to execution issued on said judgment upon affidavit that Joseph and Frank Schenck, appellees, have in their possession, and claim ownership to, certain described real estate which is the property of Eberhardt P. Schenck, which appellant prays may be subjected to sale for payment of her judgment. Finding and judgment for appellees. The only error assigned is the overruling of appellant's motion for a new trial.

The real question for decision is the conclusiveness of the partition proceeding upon the title and ownership of the inherited interest of Eberhardt P. Schenck in his father's estate, and arises upon the admission in evidence of his deed purporting to convey that interest to his brothers. Without basis therefor in the record, the argument on both sides assumes that the conveyance in question was executed before the interlocutory order of partition was made; the appellant contending that the decretal order of partition was an adjudication of Eberhardt's title and ownership upon the facts as they existed at the time the decree was entered, and is therefore conclusive, and, being subsequent to the alleged conveyance, the deed was improperly admitted in evidence to impeach the decree, while, on the other hand, appellees insist that the title of Eberhardt was not called in question by any pleading or issue in the partition action and was not therefore either established or overthrown.

It will be borne in mind that the judgment invoked by appellant was rendered in an ordinary action for partition. The complaint was in the usual form, alleging the common source of title, and common equal interests of plaintiffs and

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defendants as children of the decedent, and praying that the plaintiffs' shares be parted from the others, and set off to them in severalty. It is true that it is averred that Eberhardt P. Schenck had been advanced his full share of the estate, and that the remaining lands should be divided among the other six heirs; but this averment went only to the question of whether or not Eberhardt had already in possession his one-seventh part of the estate, and in no wise questioned his or any one else's right or title in the common property of the estate. It is well settled in this State that when the question in the case is simply one of dividing the common estate inherited from the ancestor, no question of title among the partitioners is settled by the decree. Issues may be formed in such cases in the usual way, and titles established and quieted among the parties; but in the absence of such issues there can be no adjudication beyond a division of the property. *Luntz v. Greve*, 102 Ind. 173; *Blake v. Minkner*, 136 Ind. 418, 425; *Finley v. Cathcart*, 149 Ind. 470, 63 Am. St. 292; *Thompson v. Henry*, 153 Ind. 56; *Fordice v. Lloyd*, 27 Ind. App. 414. In this case it is not shown that the title of Eberhardt was in issue, and we can not presume that it was. *Goss v. Wallace*, 140 Ind. 541; *Green v. Brown*, 146 Ind. 1, 9.

There is no pretense that the conveyance of Eberhardt to his brothers, Joseph and Frank, was fraudulent, or for less than full value. It was accomplished eight months before appellant recovered her judgment against Eberhardt, and hence no lien had attached. The deed to appellees, Joseph and Frank Schenck, was properly admitted in evidence as tending to prove their ownership, and that the land conveyed thereby was not subject to sale for payment of appellant's judgment.

The decision of the court is sustained by the evidence, and is not contrary to law. The motion for a new trial was correctly overruled. Judgment affirmed.

State v. Langdon.

THE STATE v. LANGDON.

[No. 19,915. Filed October 31, 1902.]

CRIMINAL LAW.—*Wife Desertion.*—*Limitation of Actions.*—The crime of wife desertion described in §2254 Burns 1901, is not a continuing offense, and, after two years from the time the husband leaves his wife, prosecution therefor is barred by the statute of limitations.

From Knox Circuit Court; *O. H. Cobb*, Judge.

John E. Langdon was charged with wife desertion. A motion to quash the affidavit and information was sustained. From a judgment discharging defendant, the State appeals. *Affirmed.*

W. L. Taylor, Attorney-General, *W. S. Hoover*, *J. W. Emison* and *W. W. Moffett*, for State.

J. T. Goodman, *W. A. Cullop* and *G. W. Shaw*, for appellee.

DOWLING, C. J.—Prosecution by affidavit and information for a violation of the following statute: "Whoever, without cause, deserts his wife, child, or children, and leaves such wife, or her child, or children a charge upon any of the counties of this State, or without provision for comfortable support, shall be fined not more than \$100, nor less than \$10." §2254 Burns 1901, §2133 R. S. 1881 and Horner 1901. The affidavit and information were filed May 17, 1902. The charge set forth in each is that the appellee on July 28, 1894, at Knox county, Indiana, without cause, deserted his wife, leaving her without provision for comfortable support; that the appellee and his said wife thereafter remained residents of said county; and that such desertion continued until the filing of the affidavit and information. A motion by appellee to quash the affidavit and information was sustained, and, by the judgment of the court, the appellee was discharged.

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The State appeals, and the errors assigned and discussed are the rulings of the court upon the motion to quash each count of the affidavit and information. The point made by the appellee upon the motion to quash and in this court is that the affidavit and information show upon their face that the supposed offense was committed more than two years before the filing of the affidavit and information, and, therefore, was barred by the statute of limitations. §1665 Burns 1901, §1596 R. S. 1881 and Horner 1901.

Counsel for the State contend that the offense charged was a *continuing* one, and that upon a proper construction of the statute, the prosecution could be commenced at any time while the desertion lasted.

To desert is to forsake or abandon with the intention of not returning, and, under §2254, *supra*, the crime consists in forsaking the wife under certain conditions which are particularly named in the statute. The desertion must be without cause; and the wife must be left a charge upon some county of this State, or without provision for comfortable support. Unless these conditions exist at the very time the husband deserts his wife, the criminal offense defined in §2254, *supra*, is not committed. If the husband deserts his wife upon a sufficient legal cause,—for example, habitual drunkenness,—and she afterwards reforms, then, although he still refuses to live with her and maintain her, he can not be convicted under the statute making desertion a crime. Or if he abandons her without cause, but with provision at the time for her comfortable support, he is not subject to indictment for such desertion, although the provision for her comfortable support subsequently fails. The criminal offense created by §2254, *supra*, is not to be confounded with the violation of the civil obligation to live with, and to make reasonable provision for the support of the wife. The latter is a continuing duty, which exists, with few exceptions, as long as the relation of husband and wife remains. The natural and probable defenses to an

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indictment or information for the criminal desertion of a wife are that the husband did not forsake her, or that he had sufficient cause for so doing, or that he did not leave her a charge upon any county in this State, or without provision for support. If, after five, ten, or twenty years, the husband might be indicted for leaving his wife, proof of the fact that he had lived apart from her and failed to support her, would be easy; but proof of the cause for which he abandoned her, or of the conditions existing at that time, might be difficult or impossible.

In *United States v. Irvine*, 98 U. S. 450, the defendant was indicted for *withholding* from his principal and client pension money collected by him for her under the pension laws of the United States. The money was demanded by the client December 24, 1870. The indictment was found September 15, 1875. It was held that the prosecution was barred by the statute of limitations of two years. In the course of the opinion in that case, Miller, J., said: "But whatever this may be which constitutes the criminal act of withholding, it is a thing which must be capable of proof to a jury, and which, when it once exists, renders the party liable to indictment. There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time, also, the statute of limitations applicable to the offense begins to run. It is unreasonable to hold that twenty years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead; but the fact of his receipt of the money is matter of record in the pension office. He pleads the statute of two years, a statute which was made for such a case as this; but the reply is: You received the money. You have continued to withhold it these twenty years; every year, every month, every day, was a withholding, within the meaning of the statute. We do not so construe the act. Whenever the act or series

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of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution."

Not only would the defendant be placed at an unfair disadvantage if the offense is held to be a continuing one, and therefore not barred by the statute, but he would be liable to successive prosecutions as long as the abandonment continued. Another result of the construction asked for by the State is that the act of desertion, though not criminal at the time it occurred, might afterwards become criminal because of a change in the financial circumstances of the wife or child. We can not believe that the legislature intended these consequences.

There is no similarity between the offense created by §2254 Burns 1901, and the misdemeanor of creating a public nuisance such as the obstruction of a highway. In the former case the crime consists of a single completed act committed under certain specific conditions. In the latter, the maintenance of a nuisance is a crime which the law forbids and punishes. If the statute under review, instead of making the *desertion* of a wife or child a criminal offense, had declared that a failure to make reasonable provision for these persons should be a crime, and punishable as such, then a failure to make such provision, without reasonable excuse, would be a continuing offense, and it would be contemporaneous with the continuance of the relations mentioned in the statute.

The criminal offense is against the public, and not against the deserted wife or child. It consists in conduct which the law deems pernicious to the public morals, and likely to subject the county to charges for the maintenance of the deserted wife or child. If innocent when it occurs, it can not afterwards become criminal. If subject to prosecution as soon as committed, the statute begins to run against it at that time.

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None of the decisions in civil cases, where the action was for the maintenance of a wife or child, applies here for the reason that the obligation of the husband and father to support his wife and child exists and continues until suspended or discharged by law; while the crime of desertion is a single act, defined by the statute, and capable of being committed only under the circumstances therein described.

Our construction of §2254, *supra*, is sustained by the language of the court in *Rice v. State*, 106 Ind. 139, where it is said that "The penalty of the statute is denounced against the husband or father who, without cause, deserts and leaves his wife, child, or children, without provision for comfortable support. Where, however, the wife, child, or children are, at the time of such desertion, left with a comfortable support, whether such provision was made by the husband or father, or is possessed in the right of the wife, child, or children, the desertion is not criminal within the statute."

We find no error in the rulings of the court in quashing the information. Judgment affirmed.

BAXTER v. LUSHER ET AL.

[No. 19,555. Filed November 6, 1902.]

MASTER AND SERVANT.—Carpenter.—Safe Working Place.—Contributory Negligence.—Plaintiff, being a man of mature years, weighing 160 pounds, of extended experience as a house builder, and with good eyesight, went upon an unfinished building, and without direction or advice of his employer walked upon two by six unbridged joists, fourteen feet long, which he knew were designed only to support the laths and plaster forming the ceiling of the chamber below. A defect in one of the joists caused it to break, precipitating plaintiff to the floor below. *Held*, that plaintiff was guilty of contributory negligence, and could not recover for injuries sustained. *pp.* 383-385.

APPEAL.—Instructions.—Harmless Error.—A judgment will not be reversed for errors in the giving of instructions, when, under the facts disclosed by the record, the appellant, who was plaintiff in the trial court, could not have recovered in any event. *p.* 385.

From Elkhart Circuit Court; *H. D. Wilson*, Judge.

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Action by Joseph R. Baxter against Frank Lusher and others. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

R. M. Johnson, J. D. Osborne, Anthony Deahl and B. F. Deahl, for appellant.

William Theis, O. T. Chamberlain and P. L. Turner, for appellees.

HADLEY, J.—Action to recover damages for injuries resulting from the alleged negligence of appellees. The latter were constructing a house, and after they had the frame up to the square, and the ceiling or upper joists on, they employed appellant, an experienced and skilled carpenter, to put on the roof joists. Nothing was said at the time of employment or afterwards by either party about how appellant should be supported, or what he should stand on while engaged in constructing said roof joists. The ceiling joists already in place were two by six inches by fourteen feet long, and spaced sixteen inches from center to center. Appellant ascended to the top of said ceiling joists, and entered upon the work of putting up said roof joists, by standing and walking on said ceiling joists; and, while so engaged, one of the latter joists, that had a knot traversing and severing the fiber, broke with appellant's weight, and precipitated him to the floor below, whereby he received injuries of which he complains.

The same facts are pleaded in different forms in four paragraphs. The negligence charged in the first is the failure of appellees to furnish appellant with a safe place in which to work; in the second the placing among the ceiling joists, whereon appellant was ordered to work, one that was defective, weak, and worthless; in the third the erection of a weak and insecure scaffold in the building, and directing appellant thereon to work; and in the fourth the same as the third. A demurrer was sustained to the first and second and overruled to the third and fourth paragraphs. Trial

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by jury, and a general verdict and answers to interrogatories in favor of appellees.

The assignment challenges the action of the court in sustaining appellees' demurrer to the first and second paragraphs of the complaint, and in overruling appellant's motion for a new trial. As grounds for a new trial, appellant insists that the court erred in giving to the jury each of seven instructions requested by appellees, and of four given on the court's own motion. We have examined the instructions complained of and find some of them radically bad and others unfortunately phrased; but, under the view of the case we are compelled to take by the findings of the jury, there appears to be no useful purpose to be attained by entering upon their review.

The facts disclosed by the jury's answer to interrogatories follow: The plaintiff was forty-three years of age, weighed 160 pounds, in full possession of all his faculties, and with twenty years' experience in house building at the time he was injured. When he commenced work on the appellees' building the frame was up to the square, and the ceiling joists,—designed only to support the laths and plaster, and no floor, and which were two by six inches, by fourteen feet long,—were in place, and sixteen inches from center to center, and unbridged. Some boards one by six, to one by ten, twelve feet long, were lying about loosely on the ceiling joists. Defendants employed the plaintiff to put up the roof joists, and gave him no instructions or advice as to the character of the footings that should be prepared or used to stand and walk on while engaged in the work. Plaintiff, pursuant to his employment, ascended to the top of the ceiling joists, and when he so ascended it was light and he could plainly see said joists before and as he went upon them. He could also see the loose boards lying scattered about on top the joists, and without instructions from any one, and of his own volition, walked about and worked on said ceiling joists while engaged in putting

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up said roof joists. When he had been so employed about three hours, while walking on said joists, and not in the exercise of due care for his safety, one of them, traversed near the center length by a knot which severed most of the fiber, broke with the plaintiff's weight, whereby he was precipitated about fourteen feet to the floor below, and injured. The defendants had no knowledge of the defect in said joists. The defect was open and obvious. The plaintiff had better opportunity than the defendants to see it, and the plaintiff might have seen it by the use of ordinary diligence, had he looked. The plaintiff could have taken the loose boards lying upon the joists, and, by placing them in a proper position, have stood and walked upon them at his work with safety, and by the use of ordinary care he would have avoided injury.

Here, then, we have an instance where the plaintiff, being a man of mature years, weighing 160 pounds, of extended experience as a house-builder, and with good eyes, went upon a building, and without direction or advice of his employer so to do, and without the exercise of ordinary care for his safety, walked and worked upon two by six, unbridged joists, fourteen feet long, which he knew were designed only to support the laths and plaster forming the ceiling of the chamber below, stepping from one to the other without using his eyes to see a defect that rendered one of the joists unsafe as a support, and which was plainly apparent, and without availing himself of the use of boards, conveniently near, with which he might have made his working place safe, and thereby avoided the injury for which he sues. Moreover we are informed that appellees were ignorant of the defective joist; that appellant's opportunity for discovering it was better than that of appellees', and that appellant might have seen it before stepping on to it, if he had looked.

An employer does not become an insurer of the safety of his employe. He is only required to observe due care,

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under the circumstances of the particular case, in furnishing a safe place to work, and without reference to whether the employer does or not discharge his duty in this respect, it is nevertheless the constant duty of the employe to be on the lookout for himself, and to avoid whatever injury he may by the exercise of reasonable caution. There is no rule of law that we know of that will excuse a person under any circumstances from the use of his senses for his personal safety. At all times, and in all places of peril he must keep his eyes open, and heed what he sees that threatens bodily harm, without reference to the source of the danger; and if he neglects to do so, as a general rule, he must take the consequences. It would be a harsh rule that would require an unblamable employer, who had no knowledge, and was not chargeable with notice of a recently occurring danger in the working place, to respond in damages for an injury thereby to one who negligently either closed his eyes, or, seeing, did not heed that which it was his duty to avoid.

Under the facts disclosed, appellant could not have recovered under either paragraph of his complaint, or under any instructions that might have been given to the jury. He was therefore not damaged by the sustaining of the demurrer to the first and second paragraphs of his complaint, or by the giving of erroneous instructions to the jury. A bad instruction is good enough for a bad case. *Dickey v. Shirk*, 128 Ind. 278, 287; *Cline v. Lindsey*, 110 Ind. 337, 348; *Sievers v. Peters Box, etc., Co.*, 151 Ind. 642, 662; *Roush v. Roush*, 154 Ind. 562, 573.

Judgment affirmed.

STANDISH v. BRIDGEWATER.

[No. 19,789. Filed November 6, 1902.]

APPEAL.—*Assignment of Error.*—*Constitutional Question.*—*Review*—An assignment of error that a certain specified act of the legislature is unconstitutional, is improper, and presents no question for review. p. 387.

TRIAL.—*Rejecting Evidence.*—*Offer to Prove.*—*Exception.*—In order to save an exception to a ruling of the trial court in excluding evidence, the offer to prove must be made before such ruling. p. 387.

APPEAL.—*Record.*—*Evidence.*—*Special Bill of Exceptions.*—A special bill of exceptions, under §642 Burns 1901, must show that the evidence embraced in the special bill was all the evidence given upon the issue to which the proffered evidence related. p. 388.

From Washington Circuit Court; *T. B. Buskirk*, Judge.

Action by Curg Bridgewater against Dawson Standish. From a judgment for plaintiff, defendant appeals. *Appeal dismissed.*

S. H. Mitchell and *E. C. Mitchell*, for appellant.

Elliott & Houston, for appellee.

DOWLING, C. J.—This case was commenced before a justice of the peace, and was taken to the Washington Circuit Court on appeal. The appellee, who was the plaintiff below, sued the appellant upon an account for labor performed by him on the farm of the appellant, and for a small quantity of fodder sold and delivered by him to the appellant. Answer: Denial, payment, and special plea. that appellant hired appellee to do work as a farm-hand to the amount of \$25, which sum was to be paid by the sale and delivery of a buggy by appellant to appellee; that appellee did work to the amount of \$20 under the said agreement, for which he received credit; that the appellant offered him other work, and was and is ready to deliver the said buggy as soon as it is paid for by the labor of the appellee, as he promised to do; that appellant has fully performed his part of said agreement, but that the appellee re-

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fused to complete his said contract of hiring; and that appellant has paid appellee for all other work done by him. The case was tried by the court, and, over a motion for a new trial, judgment was rendered for the appellee.

An appeal was taken to this court under the provisions of §§6 and 8 of the act of March 12, 1901 (Acts 1901, p. 565, §§1337f, 1337h Burns 1901), upon the claim that the case was within the jurisdiction of a justice of the peace, and that there was in question, and such question duly presented, the constitutionality of a statute, and the proper construction thereof.

The first error assigned is that the act of April 29, 1899 (Acts 1899, p. 193, §7059 Burns 1901), requiring weekly payments to employes in lawful money of the United States, is unconstitutional. This assignment is not a proper one, and presents no question whatever. The third, fourth, and fifth specifications are merely reasons for a new trial, and are not proper as independent assignments of error.

The sixth assignment, that the court erred in overruling appellant's motion for a new trial, is sufficient in form. The errors relied upon for a reversal of the judgment under this assignment are the rulings of the court excluding evidence of the special contract of the appellee to pay for the buggy by work as a farm-hand, on the ground that the contract was void under the act of 1899, *supra*, and that the appellant was bound to pay appellee's wages in money. In every instance the exception to the decision preceded the offer to make the proof. As has been frequently decided, this was not the correct practice, and the record presents no available error. *Shenkenberger v. State*, 154 Ind. 630; *Whitney v. State*, 154 Ind. 573; *Gunder v. Tibbits*, 153 Ind. 591.

The appellant has unsuccessfully attempted to present upon the evidence, as a reserved question of law, the constitutionality of said act of 1899, and has brought here a special bill of exceptions containing only a part of the evi-

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dence. There is nothing in the bill showing that no other evidence was given upon the point and issue to which the proffered evidence related, or that the bill embraces so much of the record and the statement of the court as will enable this court to apprehend the particular question involved. §642 Burns 1901, §630 R. S. 1881 and Horner 1901; *Acme Cycle Co. v. Clarke*, 157 Ind. 271, 279; *Conner v. Town of Marion*, 112 Ind. 517; *Smith v. James*, 131 Ind. 131; *Keller v. Reynolds*, 12 Ind. App. 383; Ewbank's Manual, §96.

As no question of the constitutionality of the statute, or of the proper construction thereof, is duly presented by the record, the appeal is dismissed.

SMITH, AUDITOR MARION COUNTY, v. SMITH ET AL.

[No. 19,826. Filed November 6, 1902.]

159	388
162	601
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164	549
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169	381
169	383

TAXATION.—Illegal Assessment.—Injunction.—Premature Action.—In the absence of a showing of an especial necessity therefor, a court of equity will not grant a writ enjoining the county auditor from the placing of an alleged illegal assessment upon the tax duplicate. Such a suit being in advance of a threatened levy by the county treasurer, would be premature.

From Marion Superior Court; *J. L. McMaster*, Judge.

Suit by Delavan Smith and another against Harry B. Smith, auditor of Marion county, to enjoin defendant from placing upon the tax duplicate an alleged illegal assessment. From a decree for plaintiffs, defendant appeals. *Reversed*.

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley* and *Frank McCray* (*amicus curiæ*), for appellant. *F. Winter* and *C. Winter*, for appellees.

GILLET, J.—On September 4, 1900, appellees commenced this action to enjoin appellant from entering upon the tax duplicate of Marion county for said year an increased assessment upon their partnership property, con-

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171	282

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sisting of personalty, of \$354,723, made by the state board of tax commissioners. Appellees' said property was assessed by the township assessor in the sum of \$45,277.34, and this amount they offer to pay. This action is so far a counterpart of the case of *Hart v. Smith*, ante, 182, that we may refer to the decision in that case for a further statement of the facts alleged in the complaint in this case. The Hart case was presented on the merits of the controversy, but in this case the Attorney-General makes the point that the action was prematurely brought.

It may be stated generally that it is required that there shall be some ground for equitable interference aside from the mere illegality of the tax to justify the interposition of equity. *Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *State Railroad Tax Cases*, 92 U. S. 575, 613, 23 L. Ed. 663; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; *Pittsburgh, etc., R. Co. v. Board, etc.*, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; 1 High, Injunctions, §484 *et seq.*, and many cases there cited.

It is the general disposition of the courts to require a careful showing of serious wrong and hardship imminently threatened by the enforcement of the tax, for which there is lacking a plain and adequate remedy at law, to justify the granting of the writ, because it is contrary to public policy unnecessarily to interrupt the ingathering of the public revenues. In *Dows v. City of Chicago*, *supra*, it was said by the Supreme Court of the United States at page 10: "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of the government, and thereby cause serious detriment to the public. No court

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of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law."

The execution of the legislative mandates respecting the assessment and collection of general taxes is intrusted to administrative officers in the executive department of the government, and the fact that a court, in the exercise of its chancery powers, is wanting in authority to order such officers to proceed, after it has stopped them by its writ, is a reason why this jurisdiction should be exercised only in cases of substantial necessity. 1 High, Injunctions, §487; *State Railroad Tax Cases, supra*; *Pittsburgh, etc., R. Co. v. Board, etc., supra*. The observation applies with especial force to applications for the writ against the making of the assessment, since the practical effect of granting writs under such circumstances would often be to relieve from a tax that ought in justice to be paid.

It would not only be improper, but exceedingly injudicious, for us to attempt to state here the circumstances under which a court should entertain an application to be relieved from a tax by injunction, where the application is made in advance of the time that the treasurer is threatening or seeking to levy. There have been decisions of this court upholding such applications. *State Board, etc., v. Holliday*, 150 Ind. 216, 42 L. R. A. 826; *Yocum v. First Nat. Bank*, 144 Ind. 272. Both of these applications rested upon equitable grounds. In the *Holliday* case the only question considered was as to the power of the state board of tax commissioners to provide for the taxation of paid-up life insurance policies, while in the *Yocum* case it appears from the opinion that the right to the relief sought was conceded by opposite counsel, if the assessment was invalid.

The question arises whether a party entitled to enjoin a tax sale should not, even where his title is clouded, be com-

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pelled to wait until the duplicate containing the objectionable assessment goes into the hands of the treasurer, and he is threatening or about to levy. It is our opinion that in the absence of a showing of an especial necessity for earlier interference he should be compelled thus to wait, because of considerations of public policy. The spreading of the assessment on the duplicate is not what creates the lien, and the objecting taxpayer knows that, in the orderly course of official procedure, the assessment will soon be open to his attack. If he succeeds, his property is relieved of the cloud without unreasonable delay, while if he fails, the assessment is in the hands of the official who is charged with the duty of collection without undue delay. The sale of real estate would cloud the title thereto, and therefore that may be a sufficient reason for enjoining the sale; but after the assessment is made there would be no ground to interpose to prevent a cloud being cast on the title by putting the assessment on the duplicate, because the title is already clouded to practically the same extent by the making of the assessment.

It is well settled in this State that equity will enjoin a threatened sale of real estate for taxes where the assessment is wholly void. *Greencastle Tp., etc., v. Black*, 5 Ind. 557; *City of Lafayette v. Jenners*, 10 Ind. 70; *Toledo, etc., R. Co. v. City of Lafayette*, 22 Ind. 262; *Jones v. Summer*, 27 Ind. 510; *Shoemaker v. Board, etc.*, 36 Ind. 175; *Pugh v. Irish*, 43 Ind. 415; *Sim v. Hurst*, 44 Ind. 579; *City of Delphi v. Bowen*, 61 Ind. 29, 33; *Goring v. McTaggart*, 92 Ind. 200; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Hobbs v. Board, etc.*, 103 Ind. 575; *Fleener v. Claman*, 112 Ind. 288; *Yocum v. First Nat. Bank*, 144 Ind. 272. In many states the taxpayer would in most instances be left to his remedy at law, but the right to injunction, where it is sought to sell real estate to satisfy taxes, has been put in this State upon our injunction statute,—§1162 Burns 1901 (*Sim v. Hurst, supra*),—and upon the more

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substantial ground stated in *Bishop v. Moorman*, *supra*, where this court, at page 2, said: "The sale of land under color of judicial process is more than a mere fugitive trespass. It is the assertion of a permanent right to the land and a full denial of the owner's title, and the rule is, that where there is an assertion of a permanent right to land the owner may maintain injunction if the right asserted is unfounded." Although our decisions upon this point are not in accord with those of many courts of great respectability, we remain content with our position as manifested by the case last cited.

The fact that personal property that has been seized by the treasurer can not be replevied (*Adams v. Davis*, 109 Ind. 10; *Maple v. Vestal*, 114 Ind. 325; *Town of Andrews v. Sellers*, 11 Ind. App. 301; *Cobbey*, Replevin (2d ed.), §333 *et seq.*), may, when coupled with other circumstances showing the want of a complete and adequate remedy at law, justify the use of the remedy of injunction in such cases. *Allen v. Winstandly*, 135 Ind. 105; *Owens v. Gascho*, 154 Ind. 225. But we are persuaded that, in all cases not involving some extraordinary necessity for the earlier issuing of the writ, it ought not to be granted before the duplicate is in the hands of the treasurer, and he is threatening or about to collect the tax. There is authority in this State that fully supports this proposition. In *Sim v. Hurst*, *supra*, it is said at page 589: "There is a defect in the second paragraph of the answer which, we think, renders it bad; and that is, that although it alleges that the auditor made the assessments in August, 1867, placed them upon the tax duplicate of the county, and delivered it to the treasurer, it is not shown that the treasurer was about to collect or was threatening to collect the same, so as to afford the plaintiffs a right to injunctive relief at any time before the action was commenced. In the case of *Green-castle Tp., etc., v. Black*, 5 Ind. 557,— a leading authority in favor of the remedy by injunction to restrain the col-

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lection of illegal taxes,—the complaint showed that a duplicate had issued to the county treasurer to collect and pay over the taxes to the township, and that the treasurer was threatening to collect and would collect them, unless restrained.”

It was observed by Frazer, J., speaking for the court in *Jones v. Summer*, 27 Ind. 510, that “The decisions of this court heretofore, in restraining the collection of taxes, have gone to the utmost extent of authority.” This is our present view, and while we believe that the courts may properly interfere in favor of a suitor who has just and equitable grounds for an application to stay the hand of the officer who is seeking to enforce a void assessment, yet we think that the courts ought, in all ordinary cases, to balance, so to speak, the demands of the State, that ought not to be delayed in the collection of its revenues, and the claims of a suitor who makes the proper preliminary showing for a temporary restraining order or temporary injunction, and to grant the latter the preventive power of the court only at that stage of the proceedings when his substantial right may be protected, if it turn out that he has one, with the minimum amount of prejudice to the public, if, upon investigation, it turn out that the writ was improvidently issued.

In our opinion, this action was prematurely commenced. On this ground, at least, the demurrer ought to have been sustained. In so far as this case involves the validity of the additional assessment made by the state board of tax commissioners, we may observe that the case of *Hart v. Smith*, ante, 182, is to be regarded as a ruling precedent.

Judgment reversed, with an order to the court below to sustain the demurrer to the complaint.

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159	428
159	438

THE STATE v. WRIGHT.

[No. 19,711. Filed November 7, 1902.]

TRADE-MARKS — *Infringement.* — *Indictment.* — An indictment for the violation of §8680b Burns 1901, prohibiting infringement of trade marks on certain bottled beverages, which fails to charge that defendant filled or caused to be filled any bottle or siphon with a liquid mentioned in the statute, is insufficient. *pp. 394, 395.*

CONSTITUTIONAL LAW. — *Review.* — Where an appeal is taken under §1337h Burns 1901, for the purpose of testing the constitutionality of a criminal statute, the validity of the statute will not be passed upon if the indictment is insufficient. *p. 395.*

From Marion Criminal Court; *Fremont Alford*, Judge.

Frank M. Wright was indicted for infringement of trade-marks. From a judgment quashing the indictment and discharging defendant, the State appeals. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *J. C. Ruckelshaus*, *J. B. Kealing*, *M. M. Hugg*, *W. W. Woollen* and *Evans Woollen*, for State.

MONKS, J. — An indictment was returned by the grand jury in the court below under §5 of the act of 1897 (Acts 1897, p. 316, §8680b Burns 1901). On motion of appellee the same was quashed and judgment rendered discharging appellee from custody.

The State claims that the court below sustained said motion to quash for the reason that the act of which said section forms a part was unconstitutional and void.

This appeal was taken under §8 of the act of 1901 (Acts 1901, p. 566, §1337h Burns 1901), for the purpose of presenting the question of the constitutionality of said act of 1897, *supra*.

The indictment charged that appellee "did then and there unlawfully have in his possession for the purpose of filling and did fill with her own bottle the property of the," etc. It is not charged in the indictment that appellee filled or caused to be filled any bottle or siphon with any liquid

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mentioned in said act, and for this reason the indictment was clearly bad, and the motion to quash properly sustained. It follows, therefore, that, conceding the constitutionality of said act, the action of the court in sustaining the motion to quash was not erroneous, but correct. It is manifest, therefore, that the constitutionality of said act is not presented by this appeal within the meaning of said §8, *supra*. *Standish v. Bridgewater, ante*, 386.

Appeal dismissed.

THE STATE v. BALSLEY.

[No. 19,831. Filed November 7, 1902.]

CRIMINAL LAW.—*Larceny.—Embezzlement.—Joinder of Offenses in Indictment.—New Trial.—Former Jeopardy.*—Where defendant is convicted for larceny, under an indictment in two counts, one charging larceny and the other embezzlement, but both growing out of the same transaction, the granting of a new trial upon defendant's motion opens the case for retrial upon the count on which he was acquitted as well as the one on which he was convicted.

From Jackson Circuit Court; *T. B. Buskirk*, Judge.

Joseph D. Balsley was convicted of larceny, but new trial granted. From a judgment overruling a demurrer to a plea in abatement, the State appeals. *Reversed*.

W. L. Taylor, Attorney-General, *S. M. Hudson*, *T. M. Honan*, *J. H. Shea* and *C. E. Wood* for State.

DOWLING, C. J.—An indictment was returned by the grand jury of Jackson county against the appellee, charging him in one count with the felony of having on the 11th day of April, 1901, embezzled the sum of \$90.80 in money, the property of the Singer Manufacturing Company, in his possession and under his control as the agent of that company, and, in another count, with having on the same day feloniously stolen, taken, and carried away the sum of \$90.80, the property of said Singer Manufacturing Company.

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The appellee pleaded not guilty, and upon a trial by a jury he was found guilty of grand larceny; the verdict being silent as to the charge of embezzlement. Afterwards, upon his motion, a new trial was granted him. He thereupon filed a plea in abatement as to the first count of the indictment, setting up the former trial, and alleging that by its verdict of guilty on the second count of the indictment, the jury had found him not guilty of the felony charged in the first, and that he had therefore been once in jeopardy upon said first count. The court overruled a demurrer to this plea, the prosecuting attorney dismissed the action as to the second count, and the appellee was discharged. The State appeals, and assigns as error the ruling on the demurrer to the plea in abatement.

The statute provides in so many words that a felony may be charged in separate counts in the indictment to have been committed by different means. §1813 Burns 1901, §1744 R. S. 1881 and Horner 1901. The statute expressly authorizes the joinder in the same indictment of separate counts for larceny and embezzlement. §1817 Burns 1901, §1748 R. S. 1881 and Horner 1901. And in giving a construction to these sections this court has held that larceny and embezzlement may be joined in separate counts of the indictment. *Griffith v. State*, 36 Ind. 406.

It is said in *Engleman v. State*, 2 Ind. 91, 94, 52 Am. Dec. 494, that "It is proper to insert several counts in an indictment, charging the same transaction, though amounting to a felony, in different modes, in order to meet the proofs in the case; and if it do not appear that different transactions or felonies are charged, the indictment should not be quashed for this cause." (Our italics.)

In the indictment before us, the felonies charged are such as may properly be joined in separate counts. The felonies so charged do not appear to have been distinct or different transactions, but from the identity of date, the place where the felony is alleged to have been committed,

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the description of the property taken, and its ownership, there is every reason to infer that a single transaction is described in both counts. The method of pleading in criminal cases is said to be "but the exercise of a prudent foresight in anticipation of a possible variance in the evidence from the allegations of the indictment." *Griffith v. State*, 36 Ind. 406, 407.

The rights of the defendant and the State upon a new trial are clearly defined by statute: "A new trial is a reëxamination of the issues in the same court. The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument." §§1909, 1910 Burns 1901, §§1840, 1841 R. S. 1881 and Horner 1901.

It is entirely clear that when the appellee asked for and obtained a new trial of the issues in his case, the results of the previous trial were wholly vacated. He could not, under the indictment, take a new trial as to the issue upon one count, and not upon the other. If he obtained a new trial, he was bound to take it upon the terms and conditions of the statute, and one of those conditions was that "the parties should be placed in the same position as if no trial had been had." This point has been decided in many cases in this State, and must be considered as settled. *Morris v. State*, 1 Blackf. 37; *Joy v. State*, 14 Ind. 139, 152; *Ex parte Bradley*, 48 Ind. 548; *Mills v. State*, 52 Ind. 187; *Veatch v. State*, 60 Ind. 291; *Patterson v. State*, 70 Ind. 341.

"Where an indictment is for but one offense, though charged in several counts in different ways, and the defendant is convicted upon some of the counts and acquitted upon others, the granting of a new trial upon his motion opens the case for retrial upon the counts on which he was acquitted as well as those on which he was convicted. *Brown v. United States*, 2 Ind. Ter. 582, 52 S. W. 56;

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Lesslie v. State, 18 Ohio St. 391; *Jarvis v. State*, 19 Ohio St. 585." 17 Am. & Eng. Ency. Law (2d ed.), 608, note 4.

In *Clem v. State*, 42 Ind. 420, 425, 13 Am. Rep. 369, the plea in abatement was upon another indictment, and averred not only a former trial for the offense charged in the second indictment and a verdict of guilty, but a final judgment on the verdict. Nothing in the plea indicated that a new trial had been asked for or granted, or that the judgment had been vacated or set aside at the request of the defendant.

The granting of a new trial on appellee's motion left him and the State in the same position as to the whole indictment and each count of it, as if no trial had taken place, and his plea disclosed that he had waived his constitutional right to assert that he had once been in jeopardy. *Ex parte Bradley*, 48 Ind. 548, 552, and cases cited.

The demurrer to the plea should have been sustained. Judgment reversed, with instructions to the court to sustain the demurrer to the plea in abatement, and for further proceedings not inconsistent herewith.

**INDIANA NATURAL GAS AND OIL COMPANY v.
HINTON.**

[No. 19,865. Filed May 27, 1902. Rehearing denied November 7, 1902.]

LANDLORD AND TENANT.—*Gas and Oil Lease.*—*Assignment.*—*Breach of Covenant.*—*Complaint.*—*Exhibit.*—In an action against the assignee of a gas and oil lease for a breach of covenant, a copy of the assignment need not be filed with the complaint, since the action is not founded on the assignment but on the lease. p. 401.

SAME.—*Gas and Oil Lease.*—*Covenants Running With the Land.*—*Breach.*—Covenants of a gas and oil lease to pay rent and to furnish the lessor with gas to heat and light his dwellings on the premises, are covenants running with the land; and in an action against an assignee of the lease, an allegation that such assignee agreed to perform the covenants is not required. p. 401.

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LANDLORD AND TENANT.—*Gas and Oil Lease.*—*Construction.*—A gas and oil lease executed on the 25th of July, 1889, provided in its first article that the lessees should drill a well within twelve months, or, failing to do so, pay lessor \$56 yearly as rent. The ninth article of the lease stipulated that lessees would furnish gas to heat and light the dwellings on the premises demised on or before November 15th. *Held*, that while the two provisions in the lease were somewhat inconsistent they were both lawful, and the failure to drill a well upon the premises within a specified time did not excuse lessee from performance of covenant to furnish gas for dwelling. *p. 403.*

SAME.—*Gas and Oil Lease.*—*Breach of Covenant.*—*Who May Maintain Action.*—The owner and occupant of lands leased for gas and oil purposes may maintain an action for a breach of a covenant in the lease to furnish gas for use on the premises, notwithstanding that such owner had conveyed the land to others to secure a debt. *pp. 404, 405.*

From Grant Circuit Court; *H. J. Paulus*, Judge.

Action by Albert H. Hinton against the Indiana Natural Gas and Oil Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

W. O. Johnson, Foster Davis, J. C. Blacklidge, C. C. Shirley and Conrad Wolf, for appellant.

A. R. Long, for appellee.

DOWLING, C. J.—This was an action upon a gas and oil mining lease to recover damages for the breach of a covenant to furnish gas to the lessor for the purpose of heating and lighting the buildings upon the premises demised. Demurrer to complaint overruled. Answer in denial. Trial by jury, and verdict for appellee. Motion for a new trial overruled, and judgment on verdict. The rulings on the demurrer and on the motion for a new trial are assigned for error.

The facts as stated in the complaint were as follows: On July 25, 1899, one Joseph McGraw, being the owner of the west half of the northeast quarter of section ten, in township twenty-two north, range seven east, in Grant county, leased to J. S. Smith and H. C. Ziegler the priv-

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ilege of drilling wells for oil, gas, and water thereon, and transporting these substances from said lands. Shortly afterwards Smith and Ziegler sold, assigned, and transferred their rights as lessees to the appellant, the Indiana Natural Gas and Oil Company. After the making of the lease, the lessor, McGraw, sold and conveyed the said lands, together with his interest in the lease, to William S. Beeson, and on March 2, 1896, Beeson sold and conveyed said lands, and his rights under said lease, to the appellee Albert H. Hinton. The said company has ever since the assignment of the lease paid to the successive owners of the said premises the money rent of \$56 stipulated for in the lease. The appellee owned and occupied the lands from March 2, 1896, until January 6, 1900. Performance of the agreement to furnish gas according to the terms of the lease was demanded by the appellee, but was refused by the appellant. The value of the gas which should have been furnished by the appellant to the appellee was \$200.

A copy of the lease was filed with the complaint, and was made an exhibit. It was in the usual form, and, among other provisions, contained the following: "The above grant is upon the following terms: (1) Second party agrees to drill a well upon said premises within twelve months from this date, or thereafter pay to the first party a yearly rental of \$56 until said well is drilled. * * * (2) Should oil be found in paying quantities upon the premises, second party agrees to deliver to first party, in the pipes with which second party may connect the well or wells, the one-eighth part of all the oil produced and saved from the premises. (3) Should gas be found, second party agrees to pay first party \$200 yearly, payable quarterly on demand, for each and every well which is transported or used off the premises, so long as the same is transported. (4) First party shall have, free of expenses, gas from the well or wells, to use at his own risk, to light and heat the dwell-

ings now on the premises, with pipe to conduct the same to said dwellings free of cost. * * * (9) Second party agree to furnish gas to first party for use at his premises on or before the 15th day of November." The lease was executed July 25, 1899, by Joseph McGraw, as lessor, and by J. S. Smith and H. C. Ziegler, as lessees.

The points made against the complaint are that no copy of an assignment of the lease by Smith and Ziegler to the appellant was filed with that pleading; that the complaint contains no averment that the appellant agreed to perform the conditions of the lease on the part of the lessees; that it was not alleged that any well was drilled on the premises leased; and that by the terms of the lease it appeared that upon the failure of the lessees to drill a well within twelve months after July 25, 1889, the only indemnity to which the lessor became entitled was a yearly money rent of \$56.

The complaint shows a sale of the lease by Smith and Ziegler, the original lessees, to the appellant, and the payment thereafter by the appellant to the appellee of the money rent as it became due, so long as the appellee occupied the lands. The action was not founded upon the assignment, if there was one, but upon the lease itself; and therefore it was not necessary to set out an assignment, or to file a copy of it with the complaint. It is only when a pleading is *founded upon* a written instrument that a copy must be filed. §365 Burns 1901, §362 R. S. 1881 and Horner 1901; *Short v. Kerns*, 95 Ind. 431; *Clark v. Trueblood*, 16 Ind. App. 98, 100; *Barnes v. Mowry*, 129 Ind. 568.

The agreement of the lessees to pay the rent, and to furnish the lessor with gas to heat and light the dwellings on the premises demised, were covenants running with the land, and the appellant, as the assignee of the lease, was bound to perform them. Its tenancy under the lease was acknowledged by its payment of the yearly rent of \$56, agreeably to the terms of that instrument, and, as assignee

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and tenant, it was charged with the performance of these conditions.

"Covenants are either real or personal; the former are such as are annexed to an estate, or are to be performed on it, and are said to 'run with the land,' so that he who has the one is subject to the other. In order to run with the land and bind the assignee it must respect the thing granted or demised, *and the covenant must concern the land or estate demised.*" Wood, Land. and Ten. (2d ed.), §306. "An assignee is personally liable to the lessor upon all covenants which run with the land; the premises also remaining liable to a distress by the latter for rent." Taylor, Land. and Ten. (8th ed.), §109. "Where a covenant is for the benefit of the estate demised it runs with the land, and will extend to the assignee, though he is not named." Wood, Land. and Ten. (2d ed.), §307, and cases cited in note 1.

It is said in *Carley v. Lewis*, 24 Ind. 23, that: "A covenant for the payment of rent, whether it be made by the grantee of lands in fee, reserving rent to the grantor, or by a lessee for a term, belongs to that class of covenants which are annexed to, and run with, the land. The land itself is the principal debtor, and the covenant to pay rent is the incident. It follows the land upon which it is chargeable into the hands of the assignee. *Van Rensselaer v. Bonesteel*, 24 Barb. 365; *Vyvyan v. Arthur*, 1 Barn. & Cr. 410."

As the assignee of the lease is liable to the original lessor, or his assigns, only in respect of privity of estate, the lessor's right of action in no sense arises upon the assignment, unless he chooses to take advantage of special conditions for his benefit contained in it. Wood, Land. and Ten. (2d ed.), §337. See, also, *De Pere Co. v. Reynen*, 65 Wis. 271, 22 N. W. 761, 27 N. W. 155; *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Bradford Oil Co. v. Blair*, 113 Pa. St. 83, 4 Atl. 218, 57 Am. Rep. 442;

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Fennell v. Guffey, 139 Pa. St. 341, 20 Atl. 1048; *McCormick v. Young*, 32 Ky. 294; *Trabue v. McAdams*, 71 Ky. 74; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394; *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917; *Waller v. Thomas*, 42 How. Pr. 337. An allegation that the assignee of the lease agreed to perform the covenants of his assignor was not required.

The proposition that the failure of the lessees to drill any well upon the premises excused the appellant from the performance of the covenant to furnish gas to heat and light the dwellings on the land is not sustained by the provisions of the lease as we understand them. The lessees agreed to drill a well within twelve months from July 25, 1889, or, failing to do so, to pay the lessor \$56 yearly as rent. By article nine of the lease, the lessees covenanted that they would furnish gas to heat and light the dwellings on the premises demised on or before November 15th, which must be understood to mean November 15, 1889. The two covenants were independent of each other. The first was in the alternative. The latter was unconditional. A breach of the latter might occur before the time allowed for the exercise of the option of the lessees expired. Gas was to be furnished within four months, but the lessees had twelve months within which to decide whether they would drill a well for their own purposes. The two covenants may have been inconsistent, but both were lawful.

Some of the rules for the construction of ambiguous or doubtful covenants in leases are the following: "The whole of a covenant is to be taken together, and that construction to be given to it which renders the whole operative; and if there is any doubt or ambiguity upon the sense of the words, or if they are susceptible of two constructions, that construction is to be placed upon them that is most strong against the person employing them, to wit, the covenantor." Wood, Land. and Ten. (2d ed.), §303, p. 650. "If covenants refer to, or are dependent upon each

other they will be construed together, and every part will be given effect if possible, and every word will be made to operate so as, if it can be done, to effectuate the intention of the parties. If, however, the covenants are independent, they must be construed by themselves; but, even in construing such covenants, the other covenants will be examined to ascertain the true intention of the parties." Wood, Land. and Ten. (2d ed.), §303, p. 654.

We think the covenant to furnish gas to heat and light the dwellings on the land was an independent agreement, and that the lessees, or their assignee, were liable for its breach. Had the lessees, or their assignee, drilled a well within the four months, and had no gas been found, a different question would have been presented.

Appellant contends that the verdict is not sustained by the evidence, and that its motion for a new trial for that reason should have been granted. The particular point insisted upon is that it was shown by the proof that the appellee, at and before the alleged breach of the covenant sued upon, had conveyed the lands to Beeson and Myers, and therefore was not entitled to damages. On this branch of the case, the following facts were established by the evidence: On March 2, 1896, Beeson, who owned the land described in the lease, sold and conveyed it to the appellee. On February 3, 1898, the appellee executed to Beeson and his wife a deed absolute upon its face, but intended to secure a debt owing from appellee to Beeson. The instrument contained this proviso and agreement: "And, also, subject to the gas and oil lease now on said premises, and the said grantees to have the proceeds accruing from said lease." On February 23, 1899, Beeson and wife, at the request of appellee, conveyed the land by quitclaim deed to one Alexander J. Myers, from whom appellee had obtained a loan of money with which the debt to Beeson was paid off. On February 28, 1899, appellee and his wife also made a quitclaim deed to Myers. These deeds were

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executed to secure Myers in the payment of the moneys lent by him to appellee. The appellee had the privilege of redeeming the land by paying the debt. On January 6, 1900, the appellee and his wife, and Myers and his wife conveyed the land by deed to James W. Lee, and the debt owing from appellee to Myers was paid from the proceeds of the sale. The appellee occupied the premises from March 2, 1896, the date at which he became the owner, until January 6, 1900, when the lands were sold and conveyed to Lee.

The deeds executed by the appellee to Beeson and to Myers were, in legal effect, mortgages only, and the appellee remained the owner in fee simple of the premises until they were sold to Lee. As such owner and occupant of the lands, the appellee was entitled to the benefit of the covenants of the lease running with the land, unless deprived of it for a portion of the time by the proviso and agreement in the deed of February 3, 1898, to Beeson. We think, however, that upon a fair interpretation the words, "the said grantees to have the proceeds accruing from said lease," refer to the \$56 to be paid as money rent, the one-eighth of the oil produced to be delivered to the appellee, and the \$200 per year for each gas-well from which gas should be transported beyond the premises, all of which "proceeds" the lessees had expressly promised to pay and deliver provided gas and oil should be found on the land in paying quantities. The covenant to furnish gas to light and heat the dwellings on the premises was one which could not be transferred to, or appropriated by, a person not in the possession of the land. Besides, the supposed transfer of the "proceeds" of the lease was conditional only, and by way of security for a debt. The creditors never had the possession of the land, and did not enforce their lien upon the lease. Their debts were paid in full. The appellee who occupied and used the lands was the only person injured by the breach of the covenant to furnish gas. The

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appellee, therefore, had the right to maintain this action for the damages sustained by him, which were occasioned by the failure of the assignee of the lease to furnish gas to heat and light the buildings on the land.

It is entirely clear that the verdict was sustained by the evidence, and was not contrary to law. Judgment affirmed.

HORNER v. LOWE.

[No. 19,844. Filed May 27, 1902. Rehearing denied November 7, 1902.]

DEED.—Acceptance.—A grantee received a deed from the grantor, and took it to the office of the county recorder for record, when he found that certain of the lots which it had been the intention to convey had been omitted. He paid the record fee, and asked that the lots described in the deed be transferred to him for taxation, but, without having the deed recorded, returned it for correction. *Held*, that there had been an acceptance of the deed. pp. 408, 409.

SAME.—Acceptance.—Waiver of Prior Executory Agreements.—When a deed has been delivered and accepted, it is deemed, in the absence of fraud or such mistake as equity will relieve against, a complete relinquishment of conflicting reservations in any prior executory contract relative to the conveyance. p. 410.

SAME.—Acceptance.—Failure of Title.—In the absence of fraud or relievable mistake, the grantee who accepts a deed without covenants cannot successfully defend against a failure of title. pp. 410, 411.

VENDOR AND PURCHASER.—Acceptance of Deed.—Mistake.—Laches.—Where a deed is accepted as security for the payment of a note, and it is afterward learned that the deed did not include all the land intended, the grantee affirms the contract thus consummated if he does not with reasonable promptitude reconvey or offer to reconvey the real estate, and tender back the note. p. 411.

From Cass Circuit Court; C. W. Watkins, Special Judge.

Action by Cornelius M. Horner against Hugh Lowe. From a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed*.

D. C. Justice, M. Winfield and E. B. Sellers, for appellant. William Guthrie and W. S. Bushnell, for appellee.

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GILLET, J.—While this action was a part of certain other actions, by virtue of an order of consolidation, it was twice before this court on appeal. See *Turpie v. Lowe*, 114 Ind. 37; *Lowe v. Turpie*, 147 Ind. 652. On the 7th day of December, 1885, James H. Turpie and William Turpie, as partners, were indebted to both the appellant and the appellee respectively. The indebtedness of said firm to appellant amounted to \$1,935. Appellant held the legal and record title to a number of lots in the town of Monon that in reality belonged to said firm, but were held by him under an oral agreement that said lots should stand as security for the repayment of said sum, and to save him harmless on account of certain other obligations of said firm on which he was surety. On the day aforesaid the parties to this suit and one of the members of said firm met, and made an oral arrangement looking to the funding of the firm's indebtedness. The firm conveyed a tract of real estate situate in Ohio to appellant for \$600, and applied said amount on the indebtedness to him, thus reducing it to the sum of \$1,335. It was then agreed that appellant should release the firm's indebtedness to him, and should convey said lots to appellee. Appellee agreed that he would pay said indebtedness to appellant, by discharging an indebtedness of \$100 owing from appellant to appellee, and by paying the balance of said \$1,335 in cash, and he also agreed that he would pay off and discharge said suretyship obligations. It was agreed on behalf of the firm that it would execute its note to appellee for the total amount of its indebtedness to appellant and appellee, and for the amount of said obligations on which appellant was surety,—said total sum being \$5,891.35,—and that the lots aforesaid, when conveyed by appellant to appellee, and certain other property, should be held as security for the repayment to him of said latter amount with interest at the rate of eight per cent. per annum. In pursuance of said agreement, said firm executed a note to appellee, as it is above

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stated it agreed to. Appellant canceled the indebtedness of said firm to him, and executed a quitclaim deed to appellee for certain of said town lots and an additional lot; and at the same time appellee executed to appellant a note for \$1,235, which is the note in suit.

There is a dispute on the evidence as to whether certain lots were included in said oral agreement to convey, but it is not open to denial that, as stated, said deed did convey certain, at least, of the lots that the oral agreement contemplated should be conveyed by appellant to appellee for the purpose of security, as above stated, and that said deed did convey an additional lot. It was claimed by appellee, in his testimony upon the trial, that it was agreed that the title to the lots that he was to receive should be an unencumbered and fee simple title, subject only to the rights of the Turpies to redeem. When the deed was delivered to appellee, he took it to the recorder of White county for the purpose of having it recorded, and he then learned that the lots that he was to have conveyed to him were not all described in the deed. He took the deed to a member of said firm, stating that there was a misdescription in the deed, and that it was a quitclaim, instead of a warranty deed, and the latter received said deed, and promised to have it corrected. Appellee also testified that he made a like request of appellant, and that he promised to correct the deed, but this was denied by the latter. From that time there were no further negotiations between the parties, and subsequently appellant bid in certain of the lots conveyed at a sheriff's sale, based on a prior judgment, and, there being no redemption, he made title thereto. Two of the lots conveyed to appellee were unencumbered, and were of considerable value. There is no evidence that it was a part of the prior agreement that the deed that appellant was to make appellee should be a warranty deed. Appellee did not tender a reconveyance to appellant. The latter paid off the note known as the Miller note that he was surety on, as afore-

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said, and the Turpies paid off the other notes that he was surety on. Appellee has not paid the note he executed to appellant, or any part thereof.

The present attitude of appellee towards the transaction is indicated by the following questions and answers that we take from his cross-examination: "Q. You took Turpies' notes for this \$1,335 that night? A. I took this property for additional security. If I could get my money back, I would give it back. Q. And after the 20th of January you refused to proceed any further with it? A. I wanted my money back, I asked my money back. Q. You refused to proceed any further? A. I have refused to deed the property back until they paid me my money back. Q. Did that include the \$5,891 note? A. Of course, they were to pay that."

It was held in *Lowe v. Turpie*, 147 Ind. 652, that appellee was not liable on his parol agreement to advance money to pay said suretyship debts, but the question remains as to his obligation to pay the debt that he directly contracted by his note to appellant.

It is claimed by appellee's counsel that the deed was not accepted by appellee, but we think that it clearly appears from the evidence that he did accept it. Although he was able to read, the deed was read to him, at least in part. He then received it into his possession, took it to the recorder at Monticello, tendered it for record, and paid the recorder the fee for recording it. It also appears that he asked to have the lots transferred to his name for the purpose of taxation. It even appears from appellee's cross-examination, relative to his refusal to deed the lots back, that he asserts title to the lots conveyed now. His objection to the deed at the time that he returned it to one of the Turpies was not to the deed, in so far as it was a vehicle of title for the conveyance of the lots that were conveyed, but his objections were based on the grounds that additional lots should have been conveyed in pursuance of the oral con-

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tract, and that the deed should have contained covenants. As to the latter objection, at least, it may be said that it was his duty to have examined the deed when he received it. See *Jaeger v. Whitsett*, 3 Col. 105. This is not a case where there was a mistake in the entire subject-matter of the contract, as in *Spurr v. Benedict*, 99 Mass. 463, and *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560.

It has been said that "Any words or acts which show an intention to receive title will be sufficient to prove acceptance." 9 Am. & Eng. Ency. Law (2d ed.), 161. This court has said that a deed is delivered if it passes under the power of the grantee, or some person for his use, with the consent of the grantor. *Dearmond v. Dearmond*, 10 Ind. 191; *Woodbury v. Fisher*, 20 Ind. 387, 83 Am. Dec. 325. Delivery is the correlative of acceptance, and a deed cannot pass under the power of the grantee until the grantor intentionally surrenders his control over it. There can be no doubt that there was a delivery by appellant. Tested by these considerations we think that the fact that there was an acceptance of the deed by the appellee is so clear that it can be affirmed as a matter of law.

When a deed has been delivered and accepted, it is deemed, in the absence of fraud or such mistake as equity will relieve against, as a complete relinquishment of conflicting reservations in any prior executory contract relative to the conveyance. *Bethell v. Bethell*, 92 Ind. 318; *Gibson v. Richart*, 83 Ind. 313; *Howes v. Barker*, 3 Johns. 506, 3 Am. Dec. 526; *Cronister v. Cronister*, 1 Watts & Serg. 442; *Jones v. Wood*, 16 Pa. St. 25; *Carter v. Beck*, 40 Ala. 599; *Bryan v. Swain*, 56 Cal. 616; *Slocum v. Bracy*, 55 Minn. 249, 56 N. W. 826, 43 Am. St. 499; *Clifton v. Jackson Iron Co.*, 74 Mich. 183, 41 N. W. 891, 16 Am. St. 621 and monographic note; Rawle, Covenants (4th ed.), 566.

If appellee were in a situation where he could get back of the deed, he might be able to present a defense, but, in the

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absence of fraud or relievable mistake, the grantee who accepts a deed without covenants cannot successfully defend against a suit for the purchase money on the ground of failure of title. *Laughery v. McLean*, 14 Ind. 106; *Johnson v. Houghton*, 19 Ind. 359; *Church v. Fisher*, 40 Ind. 145; *Cartright v. Briggs*, 41 Ind. 184; *Stratton v. Kennard*, 74 Ind. 302; *Gibson v. Richart*, *supra*, and cases there cited; *Bethell v. Bethell*, *supra*; Rawle, Covenants (4th ed.), 567.

The appellee received by the conveyance, title to two wholly unencumbered lots and to two encumbered lots. These lots constituted, in appellee's hands, a valuable security. If appellee did not get what he bargained for, in that a part of the real estate that was to stand as his security was not conveyed, and because a part of the real estate that was conveyed was encumbered by the lien of a judgment, it may be that it was his right, upon tendering a reconveyance to appellant and tendering back the note that he received from the Turpies, with the attached condition that they would restore the *statu quo* of their relations to him, to have defended against the note in suit. But being possessed of the fruits of the contract as ultimately made, it became necessary for appellee to elect as to the *status* that the transaction should assume. If he would have accomplished a rescission, it was his duty so to elect with reasonable promptitude, and to return or offer to return whatever of value he had received by the contract. By an omission to pursue this course he affirmed the contract. *Gatling v. Newell*, 9 Ind. 572; *Shaw v. Barnhart*, 17 Ind. 183; *Balue v. Taylor*, 136 Ind. 368; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420; *Johnson v. Standard Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480; *Lawrence v. Dale*, 3 Johns. Ch. 23; *Cobb v. Hatfield*, 46 N. Y. 533; *Schiffer v. Deitz*, 83 N. Y. 300. In passing upon a somewhat similar case, the supreme

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court of California said: "Although the plaintiff may have been entitled to rescind the contract, or to have it reformed, she must seek her remedy with reasonable diligence. She cannot wait for an indefinite period, and, without giving an excuse for her delay, obtain the relief she might have been entitled to upon a more prompt assertion of her right." *Barfield v. Price*, 40 Cal. 535, 542.

The provisions of the contract of appellant, appellee, and the Turpies were inextricably bound together, and it was not possible for appellee to restore any of the other parties to their former situation unless appellee offered to relinquish all that he received by the transaction. Instead of doing this, we find that, although more than fifteen years have elapsed, he has neglected to tender a reconveyance to appellee or to surrender the note that he holds, and that he still manifests a disposition to yield none of the advantages that accrued to him under the contract. "A contract can not, for either mistake or fraud, be rescinded in part, and affirmed in part. It must be rescinded *in toto*, or not at all." *Johnson v. Houghton*, 19 Ind. 359; *Citizens St. R. Co. v. Horton*, 18 Ind. App. 335, and cases there cited. We are not unmindful of the claim of appellee that appellant promised to correct the deed. Such promise might have operated to extend the time in which appellee might have elected to rescind, but years have passed since appellee must stand charged with notice that such promise would not be performed. Appellee's conduct amounts to an election to treat the contract as valid. It is not permissible to reelect, and the time has long gone by when any act of his could affect the contract.

The court below erred in overruling appellant's motion for a new trial. Judgment reversed, with an instruction to the court below to grant appellant's motion for a new trial.

JOHNS ET AL. v. THE STATE.

[No. 19,827. Filed November 18, 1902.]

CRIMINAL LAW.—*Pleading.*—Where a criminal statute provides a definition of an offense and states specifically what act constitutes it, it is sufficient to charge the offense in the language of the statute; but where the definition of the offense contains generic terms, it is not sufficient to allege the species of the crime, but the particulars thereof must be stated. *pp. 414, 415.*

SAME.—*Pleading.*—*Bunko-Steering.*—An information for bunko-steering, charging that defendants, by "duress and fraud," compelled another to lose and part with a large amount of money on a foot-race, is insufficient in failing to state the nature of the fraud and duress, though stated in the language of the statute defining the crime. *pp. 415-418.*

From Franklin Circuit Court; *F. S. Swift*, Judge.

John S. Johns and another were convicted of bunko-steering, and they appeal. *Reversed.*

Reuben Conner, Lon Conner, J. B. Kidney, B. K. Elliott, W. F. Elliott and F. L. Littleton, for appellants.

W. L. Taylor, Attorney-General, *C. C. Hadley* and *Merrill Moores*, for State.

GILLET, J.—The appellants, John S. Johns and John P. Haughn, appeal to this court from a judgment convicting them of a violation of §2178 Burns 1901. That statute is in the words following: "Whoever allures, entices, or persuades another to any place upon any pretense, and then, by duress or fraud, compels such person to win or lose or advance or loan money, or execute or give his note or other obligation either for money or anything of value, or to part with anything of value, upon any game or wager, or by means of any trick, device, or artifice,—is guilty of bunko-steering, and, upon conviction thereof, shall be imprisoned in the State prison not more than fourteen years nor less than two years; and all persons present at such place at such time, and engaged therein, shall be prosecuted, tried, and punished for such offense as principals."

159	413
165	573
4185	574

159	413
1166	290
1167	418

159	413
169	126
169	246
169	559

159	413
171	4
171	5

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The information, aside from the caption, is as follows: "George L. Gray, prosecuting attorney in and for the thirty-seventh judicial circuit of the State of Indiana, now gives the Franklin Circuit Court to understand and be informed that John P. Haughn, Albert H. King, John S. Johns, and J. C. Stillson, of said Franklin county, on the 1st day of June, 1901, at and in the county of Franklin, in the State of Indiana, did then and there unlawfully and feloniously allure, entice, and persuade one Edward W. Duvall to go to a certain place in said county, to wit, to the public highway extending southwardly from the Brookville and Whitcomb free gravel road through sections twenty-one and twenty, in township number nine, range two west, to the east fork of the Whitewater river, upon the pretense that two men, to wit, Perry Ballard and J. C. Stillson, would then and there run a foot-race for a wager of \$1,700, and said John P. Haughn, Albert H. King, John S. Johns, and J. C. Stillson did then and there unlawfully and feloniously, by duress and fraud, compel the said Edward W. Duvall to lose and part with a large amount of money, to wit, the great sum of \$1,700, upon a certain game, to wit, a foot-race between two men. That all of said defendants, to wit, John P. Haughn, Albert H. King, John S. Johns, and J. C. Stillson, were then and there present at said place and engaged in so compelling said Edward W. Duvall to so lose and part with said sum of money, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana, as Edward W. Duvall has complained on oath. [Signed] George L. Gray, prosecuting attorney."

The appellants moved to quash the information, but their motion was overruled, and they excepted. An assignment of error brings said ruling under review.

If a criminal statute provides a definition of an offense, and states specifically what acts constitute it, it will suffice to charge the offense in the language of the statute. *State*

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v. *M'Roberts*, 4 Blackf. 178; *Malone v. State*, 14 Ind. 219; *Payne v. State*, 74 Ind. 203; *Howard v. State*, 87 Ind. 68. But where the definition of the offense contains generic terms, it is not sufficient to allege the species of the crime, but the pleader must descend to particulars. *Bowles v. State*, 13 Ind. 427; *Malone v. State*, *supra*; *State v. Bruner*, 111 Ind. 98; *United States v. Cruikshank*, 92 U. S. 542, 23 L. Ed. 588; *United States v. Carl*, 105 U. S. 611, 26 L. Ed. 1135; *Boyd v. Commonwealth*, 77 Va. 52; *State v. Graham*, 38 Ark. 519; *Burch v. Republic*, 1 Tex. 608; *Kerry v. State*, 17 Tex. App. 178, 50 Am. Rep. 122.

Serjeant Hawkins, in his *Pleas of the Crown* (8th ed.), Vol. 2, Chap. 25, §111, said: "Neither doth it seem to be always sufficient to pursue the very words of the statute, unless by so doing you fully, directly, and expressly allege the fact, in the doing or not doing whereof the offense consists, without the least uncertainty or ambiguity." In *United States v. Simmons*, 96 U. S. 360, 362, 24 L. Ed. 819, the Supreme Court of the United States stated the rule and the exception in the following language: "Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bishop, *Crim. Proc.*, §611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute." In a later case the same court said: "A rule of criminal plead-

ing, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States v. Mills*, 7 Pet. 138, 8 L. Ed. 636, that an indictment for a statutory misdemeanor is sufficient if the offense be charged in the words of the statute, must under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States v. Carll*, 105 U. S. 611, 612, 26 L. Ed. 1135, 'fully, directly, and expressly, without any uncertainty and ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.' " *Evans v. United States*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 38 L. Ed. 830.

As evincing the position of this court upon the subject, both in its early history and quite recently, we quote the following from the opinion in the case of *State v. Darlington*, 153 Ind. 1, 2: "It is generally true, as a rule of criminal pleading, that, where the principal act or acts constituting the offense are clearly defined by the statute, it is sufficient to charge the offense in the language of the statute. But, as was said in *State v. Aydelott*, 7 Blackf. 157, 'this mode of setting out an offense is not always attended with the requisite certainty.' " In *Malone v. State*, 14 Ind. 219, 222, it was said: "As an approximation to a test on this subject, perhaps it may be said that, where the statute defines the offense generally, and designates the particular acts constituting it, as, for example, the case of larceny, it is sufficient, in charging the crime, to follow substantially the language of the statute; but where the statute defines the crime generally, without naming the particular acts constituting it, as if a statute makes it a crime to encourage a slave to run away from his master, without defining the act which should be deemed to constitute encouragement, it might be necessary to set out the acts done, that it might appear to the court that they constituted the offense."

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There are some crimes defined by words of technical description, such as ravished, murdered, etc., where it is proper to use such words in a charge of the offense. *Stuckmyer v. State*, 29 Ind. 20; *Betts v. State*, 93 Ind. 375. It is also proper to describe an act as done feloniously, burglariously, etc. Acts may be charged to have been done with a certain state of mind, where that is an element in the definition of the crime. *State v. Miller*, 98 Ind. 70. Thus it has been held proper, in a prosecution under one of the embezzlement statutes, to charge that the act was fraudulently done. *State v. Beach*, 147 Ind. 74, 36 L. R. A. 179. But in such a case as the one last cited the use of the statutory term does not tend to make uncertain the offense sought to be charged. The defendant in such a case is sufficiently apprised by the charge of the character of evidence that will be offered against him, and the record sufficiently protects him against a subsequent jeopardy. There are cases also where, to avoid prolixity, a more general form of pleading is permissible; as, where combined acts constitute a single crime. *Shilling v. State*, 5 Ind. 443; *Shinn v. State*, 68 Ind. 423; *Parks v. State*, ante, 211.

The case at bar, however, does not fall within any of these classes. It is alleged that the prosecuting witness was compelled to lose and part with a specified amount of money upon a certain game "by duress and fraud." The element of duress or fraud is essential to the offense charged, but it is evident that they must consist of acts. Duress and fraud may take forms innumerable, and the presence of these words in the charge could but serve to admonish a person accused that such a case would be sought to be established against him, but they would not be at all calculated to advise him of the character of the evidence that he must expect to meet. In many civil cases pleadings have been condemned that attempted to aver duress or fraud in general terms. It seems unnecessary to gather the authorities upon

this proposition, but, as particularly covering it, we cite *Richardson v. Hittle*, 31 Ind. 119, 120, where it was said: "Fraud, duress, and coercion are alike made up of distinct facts, and all may vary greatly in their circumstances. It has been repeatedly ruled by this court, that an answer setting up fraud must aver the facts, and that an answer averring fraud without stating the facts constituting it is bad on demurrer. There is no difference in principle, as to pleading, between fraud and coercion. Mr. Chitty, in his forms, states the facts which constitute duress. 3 Chitty, Pleading, 964 *et seq.* So are all the precedents." It can not be that a degree of uncertainty that would condemn a pleading in a civil case could be upheld in a criminal case, where liberty is involved. As declared by Mr. Bishop in 1 Crim. Proc. (4th ed.), §331: "The facts in allegation must be the primary and individualizing ones." As stated by Mr. Wharton: "The indictment must contain a specific description of the offense, it is not enough to state a mere conclusion of law." Wharton, Crim. Pl. & Pr. (9th ed.), §154. By the use of the words "fraud" and "duress" there was a grouping of matters of fact and the whole was cast into the form of a legal conclusion.

We need not go the length of stating that the prosecution was in denial of the constitutional right of the appellants to demand the nature and cause of the accusation against them, but we are entirely clear that the charge did not possess that degree of certainty which is requisite in criminal pleading, and for this reason, at least, the motion to quash should have been sustained.

The judgment as against appellants is reversed, with an instruction to the trial court to sustain their motion to quash, and for further proceedings. The clerk will make the proper order for the return of appellants.

Gunn v. Haworth.

GUNN ET AL. v. HAWORTH ET AL.

[No. 19,790. Filed October 16, 1902. Motion to reinstate denied November 18, 1902.]

159	419
162	370
163	666

159	419
1170	663

APPEAL AND ERROR.—*Term-Time Appeal.*—*Parties.*—A term-time appeal may be taken, under the provisions of §647a Burns 1901, by part only of coparties against whom a judgment has been rendered, and in such case it is not necessary to name those not appealing in the assignment of errors. p. 420.

SAME.—*Assignment of Error.*—*Names of Parties.*—The assignment of errors on appeal must contain the full names of the parties. The use of initial letters for Christian names is insufficient. pp. 420, 421.

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Proceeding by Cassius Haworth and others for the construction of a free gravel road. From a judgment for the petitioners, Henry N. Gunn and others, remonstrators, appeal. *Appeal dismissed.*

I. W. Christian, *W. S. Christian* and *E. E. Cloe*, for appellants.

George Shirts and *W. R. Fertig*, for appellees.

HADLEY, J.—Appellees filed before the board of commissioners of Hamilton county their petition for the construction of a free gravel road under the act approved April 8, 1885 (Acts 1885, p. 162), and such proceedings were had thereunder that appellants and one Mary Likens seasonably filed their joint remonstrance against the viewers' report for the causes, "(1) That the viewers' report is not according to law; and (2) the land of each remonstrator is not benefited." The remonstrance was determined adversely to all of the remonstrators, and they all joined in an appeal to the circuit court. The remonstrance was submitted to trial by jury, and resulted in a verdict for the petitioners, and a judgment for costs against "Henry N. Gwinn, John Siler, Obed A. House, David F. House, James M. Beck, William O. Rich, Samuel Shively and Mary Likens," these being

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all the remonstrators. A joint motion for a new trial was made and overruled, and the remonstrators appeal.

The assignment of errors in this court is entitled as follows: "Henry N. Gunn, John Siler, O. A. House, David F. House, James M. Beck, W. A. Rich, Samuel Shively, appellants, v. Cassius Haworth, [and about seventy others the Christian names of eighteen of whom being given by initials only] appellees."

Appellees claim the assignment is insufficient to challenge the judgment of the circuit court: (1) Because Mary Likens, one of the joint judgment defendants, as shown by the record, is not named as an appellant; (2) because the Christian names of two of the appellants and eighteen of the appellees are given only by initial letters; and (3) because Henry N. Gunn, in the assignment, is not *idem sonans* with Henry N. Gwinn the judgment defendant, and that for each of these reasons the appeal should be dismissed.

With respect to the first ground for dismissal, the record shows that this is a term-time appeal, and governed by §647a Burns 1901, which provides that part, only, of coparties against whom a judgment has been taken, may appeal without making other coparties parties to the appeal, and in such case it is unnecessary to name those not appealing in the assignment of errors. See *Shuman v. Collis*, 144 Ind. 333; *McKee v. Root*, 153 Ind. 314. Nothing appearing to the contrary this court presumes that Mary Likens was omitted from the assignment of errors under the authority of the above section.

The second ground presents a more serious question. To overrule this ground requires us to hold that the use of initial letters for Christian names is a sufficient designation and identity of the parties to an action; and this we can not do. It was said by this court very early in its history that "there is no principle more certainly and satisfactorily settled than that, in all actions, the writ and declaration

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must both set forth, accurately, the Christian and surname of each plaintiff and each defendant." *Hays v. Lanier*, 3 Blackf. 322. The same doctrine has always been, and is still, the law of this State, except as may be otherwise provided by statute. It has also been decided a great many times that the assignment of errors is the appellant's complaint in this court, and that the full names of all the parties to the judgment complained of must be set out in the title or body of the assignment. Rule 6 of this court; *Burke v. State*, 47 Ind. 528; *Thoma v. State*, 86 Ind. 182; *Snyder v. State, ex rel.*, 124 Ind. 335; *State v. Hodgin*, 139 Ind. 498.

It is said in *Burke's* case: "The assignment of errors in this court is like a complaint in the court below, in which the full names of the parties must be given;" and in *Hodgin's* case: "Another and indispensable requirement of this rule [6] is that the 'full names of the parties' shall be stated." See, also, to the same effect, *Garside v. Wolf*, 135 Ind. 42; *Gourley v. Embree*, 137 Ind. 82; *Hutts v. Martin*, 141 Ind. 701; *Big Four, etc., Assn. v. Olcott*, 146 Ind. 176; *McClure v. Shelburne Coal Co.*, 147 Ind. 119; *Barnett v. Bromley Mfg. Co.*, 149 Ind. 606; *Loucheim v. Seeley*, 151 Ind. 665; *Smith v. Fairfield*, 157 Ind. 491; *Elliott*, App. Proc., §§186, 322; *Ewbank's Manual*, §226.

Section 5623 Burns 1901, relating to drainage, provides that the petition shall be sufficient to give the court jurisdiction and power to fix liens if the lands are described as belonging to the persons who appear by the last tax duplicate to be the owners; and it was held by us in *Goodrich v. Stangland*, 155 Ind. 279, which was a drainage case, that when the initials of the Christian names of certain appellees were given in the assignment of errors just as they were given by the persons themselves in their own pleadings in the case, it would not render the assignment sufficiently defective to entitle them to a dismissal of the appeal. But this is not a drainage case, and there is to be found nowhere

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in the statute under which this proceeding is had any warrant for a departure from the well established rule; and as relates to Henry N. Gunn, O. A. House and W. A. Rich who appear as appellants, and join in the assignment of errors, it is clear that we are not justified in assuming that they are the same persons as Henry N. Gwinn, Obed A. House and William O. Rich, against whom the judgment was rendered.

The appeal should be dismissed. Appeal dismissed.

THE STATE *v.* WRIGHT.

[No. 19,710. Filed November 19, 1902.]

159 422
159 696

CRIMINAL LAW.—*Unlawful Use of Labeled Bottles.*—*Indictment.*—An indictment, under §§8678-8680c Burns 1901, for filling with beer bottles belonging to another, is bad for failing to charge that such act was done with intent to defraud the owner of the bottles. *pp. 422, 423.*

APPEAL AND ERROR.—*Constitutionality of Statute.*—Where an indictment was properly quashed for reasons other than that the statute on which the indictment was based was unconstitutional, the question of the constitutionality of the statute is not presented on appeal within the meaning of §1337h Burns 1901. *p. 423.*

From Marion Criminal Court; *Fremont Alford*, Judge.

Frank M. Wright was indicted for refilling labeled bottles. From a judgment quashing the indictment and discharging defendant, the State appeals. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *J. C. Ruckelshaus*, *J. B. Kealing*, *M. M. Hugg*, *W. W. Woollen* and *Evans Woollen*, for State.

MONKS, J.—An indictment was returned in the court below, charging that appellee “did * * * unlawfully have in his possession for the purpose of filling, and did fill with beer, seven bottles the property of one,” etc. On motion of appellee the indictment was quashed, and final judgment rendered discharging appellee.

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The Attorney-General claims that the court below held the act of 1897 (Acts 1897, pp. 313-316, §§8678-8680c Burns 1901), under which the indictment was returned, unconstitutional, and for that reason quashed the indictment. The State appeals to this court under §8 of the act of 1901 (Acts 1901, p. 565, §1337h Burns 1901), for the purpose of presenting the question of the constitutionality of said statute.

Under §5 of said act of 1897 (§8680b Burns 1901), no person is guilty of an offense for filling or causing to be filled any bottle or siphon with beer, unless it is done with the intent to defraud the owner or owners of such bottle or siphon. As the indictment in this case did not charge that appellee filled said seven bottles of beer with the intent to defraud the owner thereof, the motion to quash was properly sustained for that reason, even if said act is constitutional. It is evident therefore that the question of the constitutionality of said act is not duly presented within the meaning of said §8, *supra*. *State v. Wright, ante*, 394; *Standish v. Bridgewater, ante*, 386.

Appeal dismissed.

MAUMEE SCHOOL TOWNSHIP v. SCHOOL TOWN
OF SHIRLEY CITY.

[No. 19,824. Filed November 20, 1902.]

SCHOOLS AND SCHOOL DISTRICTS.—*Municipal Corporations.—Incorporation.—Title to School Property.*—The act of 1899 (Acts 1899, p. 376) providing "that in all cases where any city or incorporated town of this State has annexed, or shall hereafter annex, any territory, or where any town shall be hereafter incorporated in which territory so annexed or incorporated there was, or shall be, the property of any school township used by such school township for school purposes, and such school township was, or shall be, at the date of such annexation indebted," etc., the school corporation of such city or town shall be liable for such indebtedness and shall not be entitled to the possession of such property until it shall have paid such indebtedness, does not apply to school property embraced within a town which was

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incorporated prior to the passage of this act, and in such case, in the absence of any statute making the school city liable for the payment of the debt, the property passed by operation of law to the school city.

From Allen Circuit Court; *J. W. Adair*, Special Judge.

Action between Maumee school township and the school town of Shirley City for the possession of school property. From a judgment for the town, the township appeals. *Affirmed.*

W. P. Breen and *John Morris, Jr.*, for appellant.

W. G. Colerick, K. C. Larwill and *Guy Colerick*, for appellee.

DOWLING, C. J.—In 1894, Maumee school township caused to be built on lands owned by it for school purposes a schoolhouse costing \$3,500. Afterward, on April 8, 1897; the town of Shirley City was incorporated under the general law of this State. The boundaries of the town at the time it was laid out and incorporated included this school lot and building. A board of trustees for the school town of Shirley City having been duly elected and qualified, it claimed the possession and control of this school property. The trustees of Maumee school township denied the right of the board to such possession and control on the ground that the school township, on March 3, 1899, was indebted for the buildings constructed on the said lot to the amount of \$1,104.66; that by virtue of the provisions of an act of the legislature passed March 3, 1899 (Acts 1899, p. 376, §5997a Burns 1901), the school city was made liable for said debt, and the possession of the said school lot and building was given to the school township until it should be fully paid. The appellee contends that this is not the proper construction or legal effect of the said act, and insists that, if it is, the act is retrospective, devests vested rights, and, therefore, is unconstitutional and void.

It is entirely clear, as we think, that the act of March 3, 1899, *supra*, does not apply to the circumstances of this

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case. So much of it as bears upon the question before us is as follows: "Section 1. Be it enacted, * * * that in all cases where any city or incorporated town of this State *has annexed, or shall hereafter annex* any territory, or where any town *shall be hereafter incorporated in which territory so annexed or incorporated* there was or shall be the property of any school township used by such school township for school purposes, and such school township was, or shall be at the date of such annexations, indebted either for the purchase of said school property, or for buildings constructed thereon, which indebtedness is unpaid at the date of the passage of this act, it shall and is hereby made the duty of the school corporation of such city, or incorporated town to pay such indebtedness, and such school corporation is hereby declared to be and made liable therefor. Until such city or town school corporation shall have paid such indebtedness it shall not be entitled to possession of such property, or to a deed therefor," etc. (Our italics.)

This statute operated on cities and towns which, previously to the passage of the act, had *annexed* territory on which school property was situated, or which should *annex* such territory subsequently to the passage of the act. It applied, also, to those cities and towns which should be incorporated after March 3, 1899, in which territory annexed by them, or included within their corporate limits, there was, or should be, the property of any school township used by such school township for school purposes.

In construing a statute, its words must be interpreted according to their plain and ordinary sense. The term "annex" means to add or unite to something already existing; to subjoin; to affix; as, to unite a province to a kingdom, a codicil to a will, a condition to a grant. In Black's Law Dictionary, the word "annexation" is thus defined: "The act of attaching, adding, joining, or uniting one thing to another; generally spoken of the connection of a smaller or subordinate thing with a larger or principal thing.

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* * * So, the incorporation of newly-acquired territory into the national domain, as an integral part thereof, is called 'annexation,' as in the case of the addition of Texas to the United States." The town of Shirley City did not at any time *annex* the tract of land on which the school property in dispute was situated. That lot was embraced within the territory of the town at the time the town was incorporated. Before the incorporation of the town, there was nothing to which to annex the lot. At the time of the incorporation of the town, this lot, like all other lots within the boundaries of the corporation, was a portion of the property constituting the territorial area of the town. The legal proceedings by which it was brought within the limits of the corporation could not, by the most violent straining of the signification of the term, be denominated "annexation." As well might it be said that the county of Allen was annexed to the State of Indiana, or Maumee township annexed to that county.

The statute, as we have observed, also extended to "any town hereafter incorporated," i. e., incorporated after the passage of the act of March 3, 1899. But the town of Shirley City was incorporated April 8, 1897, or nearly two years *before* the act was passed. It being evident that the act of March 3, 1899, does not apply here, we are not required to determine the question of its constitutionality.

In this State public school property is held in trust for school purposes for the use of the public by the persons or corporations authorized, for the time being, to control the same. The person or corporation so holding the property is merely an agent or trustee for the State, or its inhabitants, and is liable at any time to be displaced, removed, or superseded by an act of the legislature, or by a change in the situation of the property by virtue of existing laws.

Prior to the enactment of the statute of March 3, 1899, *supra*, it had been declared by this court in numerous cases

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that where a town was incorporated within the limits of a school township, a schoolhouse situated within the limits of the town passed to the possession and control of the school trustees of the town. The school board of the town succeeded, as a new statutory trustee, to the management and control of such school property within the territorial limits of the newly incorporated town, and the authority of the trustee of the township over such schoolhouse, upon the election and organization of the school board of the town, was wholly excluded therefrom. The fact that the school property was not paid for at the time of the incorporation of the town did not affect the authority of the school board of the town over it. By the act of March 3, 1899, a different provision was made under some circumstances; but, as we have seen, that act does not touch this case. §5996 Burns 1901. *School Tp., etc., v. School Town of Macy*, 109 Ind. 559; *School Town of Leesburgh v. Plain School Tp.*, 86 Ind. 582; *Carson v. State, ex rel.*, 27 Ind. 465; *Johnson v. Smith*, 64 Ind. 275; *Board, etc., v. Center Tp.*, 143 Ind. 391; Cooley, Const. Lim. (6th ed.), 228, note 2, 229, note 2.

It follows that when the town of Shirley City was incorporated, and a board of school trustees for the school city was elected and qualified, the school property within the corporate limits of the town, previously controlled and managed by Maumee school township, passed, by operation of law, to the control and management of the school board of the town, notwithstanding the fact that said Maumee school township owed a debt for the purchase of the lot or the construction of the school buildings. At the time of the incorporation of the town of Shirley City, no law of this State made the payment of a debt owing by the school township for school property a condition of the transfer of such property by operation of law to the school city in which it was situated. *Board, etc., v. Center Tp., supra.*

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Several minor questions of pleading are discussed by counsel, and have been examined by us, but, in view of the conclusions stated in this opinion, they do not require special attention. The rulings of the court on the several demurrers were correct, and its judgment is affirmed.

ANDRYSIAK *v.* SATKOSKI.

[No. 19,814. Filed May 13, 1902. Rehearing denied November 21, 1902.]

APPEAL AND ERROR.—*Bill of Exceptions.—Instructions.*—Instructions given or refused can not be presented on appeal, under §638a Burns 1901, by an original bill of exceptions. *p. 429.*

SAME.—*Instructions.*—Instructions given or refused can not be considered on appeal, when they only appear in the record as a part of the motion for a new trial. *p. 430.*

HUSBAND AND WIFE.—*Suretyship of Wife.—Bills and Notes.*—A wife joined with her husband in the execution of a mortgage upon the husband's real estate to secure certain notes given for the balance of purchase-money thereof. Thereafter the husband and wife executed a note and the proceeds thereof were applied to the payment of one of the purchase-money notes so secured. *Held*, in an action on the latter note, that the wife was surety. *p. 430.*

SAME.—*Suretyship of Wife.—Bills and Notes.—Inchoate Interest of Wife.*—The fact that a wife had an inchoate interest in real estate does not make her the principal on a note given by her and her husband, the proceeds of which were applied to the payment of her husband's note secured by a mortgage on the real estate. *p. 431.*

From Laporte Superior Court; *J. C. Richter*, Special Judge.

Action by William Satkoski against Franceska Andrysiak and others on a promissory note. From a judgment for plaintiff, defendant Franceska Andrysiak appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

M. F. Krueger, for appellant.

C. R. Collins and *J. B. Collins*, for appellee.

MONKS, J.—Appellee brought this action against appellant and others on a promissory note executed by appellant

150	428
180	528
100	530
150	428
163	579
150	428
164	394
164	400
164	402

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and another. The complaint did not disclose the fact that appellant was a married woman. Appellant filed an answer alleging that "she was a married woman when the promissory note sued upon was executed, and that she executed the same as the surety of her husband, and not otherwise, and that she received no part of the consideration therefor, but the same was executed solely to secure her said husband's debt." A trial of said cause resulted in a verdict in favor of appellee, and, over a motion for a new trial, judgment was rendered on the verdict. The motion for a new trial assigns as causes therefor: (1) The court erred in instructing the jury to return a verdict in favor of the plaintiff; (2) the court erred in refusing to give to the jury each of the instructions requested by the defendant; (3) that the verdict of the jury is not sustained by sufficient evidence; (4) that the verdict is contrary to law.

It is first insisted by appellee that the instructions given and those refused are not properly before us for consideration. This insistence of appellee is correct. The motion for a new trial contains instructions requested by appellant, and one given by the court; and the original bill of exceptions, certified to this court under the act of 1897 (Acts 1897, p. 244, §638a Burns 1901), contains an instruction given, and instructions requested by appellant and refused. It has been uniformly held by this court that only the evidence given and offered in a cause, and "the rulings of the court in respect to the admission and rejection of evidence, and the competency of witnesses, and the objections and exceptions thereto," can be presented to this court on appeal by an original bill of exceptions, under the act of 1897, *supra*, and that instructions given or requested, although contained in such original bill, can not be considered on appeal. *Adams v. State*, 156 Ind. 596, 604, and cases cited; *Maynard v. Waidlich*, 156 Ind. 562, 566; *Ewbank's Manual*, §35.

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Neither will instructions given or refused be considered on appeal when they only appear in the record as a part of the motion for a new trial. *Thompson v. Thompson*, 156 Ind. 276, 278, and cases cited; Ewbank's Manual, §28.

The evidence shows that Lorenz Andrysiak, husband of appellant, purchased real estate in Laporte county, Indiana, which was conveyed to him by deed. At the time of the execution of the deed, he and appellant, his wife, executed a mortgage on said real estate to secure two promissory notes for \$300 each, executed by said Lorenz for the unpaid purchase money. Afterwards, said Lorenz and appellant, his wife, executed the note sued upon, for \$300, to appellee, and the \$300 obtained on said note from appellee was paid on one of the \$300 notes given for the purchase money of said real estate.

The relation of suretyship is fixed by the arrangement and equities between the debtors, and is determined by inquiring who received the consideration of the contract, either in person, or in benefit to his or her estate. *Lackey v. Boruff*, 152 Ind. 371, 376, and cases cited; *Field v. Noblett*, 154 Ind. 357, 360, and cases cited. In *Lackey v. Boruff*, *supra*, the court quoted with approval the following from *Vogel v. Leichner*, 102 Ind. 55, 60: "That the husband and wife both appeared on the face of the papers to be principals, or that the parties dealt on the basis that both were principals, is of no consequence. The wife had no power to deal as principal if in fact she was surety. Whether she was principal or surety will be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was the wife to receive, either in person or in benefit to her estate, or did she so receive, the consideration upon which the contract rests?"

Tested by this rule, the contract of appellant, in the execution of said \$300 note to appellee, was one of suretyship. She did not receive the benefit of the consideration of said

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promissory note, either in person or in benefit to her estate. The money loaned by appellee on said note was used to pay the debt of appellant's husband, and he received in person and in benefit to his estate, the consideration upon which the promissory note rests.

The fact that appellant had an inchoate interest in the real estate released from the lien of a mortgage by the payment of said money does not bring the case within the rule declared by this court in *Fitzpatrick v. Papa*, 89 Ind. 17. In that case the husband and wife, after the taking effect of the act of 1879 (Acts 1879, p. 160) which prohibited a married woman from encumbering her property as security for a debt of her husband, executed a mortgage on real estate, the separate property of the wife, to secure a promissory note, the consideration of which was the release of a subsisting lien on the wife's said real estate. It was correctly held that a married woman who executed a mortgage on her separate real estate, to secure the release of a valid lien thereon, can not escape the consequences of her act upon the ground that the mortgage was executed to secure the debt of her husband. In such case the benefit moves to her, for it relieves her property from a burden. *Lackey v. Boruff*, 152 Ind. 371, 376.

It follows that the verdict of the jury is contrary to law. Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

ON PETITION FOR REHEARING.

MONKS, J.—Appellee urges in his petition for a rehearing that the court erred in holding that the use of the money procured on the note sued upon to pay the mortgage on her husband's real estate executed to secure his individual debt, did not make appellant a principal on said note.

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It has been held by this court that when a wife joins her husband in executing a mortgage on his real estate to secure his individual debt, her contract is not one of suretyship so far as her inchoate interest in said real estate is concerned, within the meaning of our statute, and that said mortgage is a lien on her said inchoate interest, and may be foreclosed against her. *Cupp v. Campbell*, 103 Ind. 213, 216, and cases cited.

If a wife cannot protect her inchoate interest in the land of her husband against the foreclosure of a mortgage executed by him and her on such land to secure his individual debt, on the ground of suretyship, as held in the case last cited, it is clear that the use of the consideration of a note executed by them to pay and satisfy such debt and mortgage will not, of itself, be sufficient to make her principal on such note.

It necessarily follows, therefore, that the use of the consideration of the note sued upon to pay the mortgage executed by appellant and her husband on his real estate to secure his individual debt was not for the benefit of her estate, and did not make her a principal on the note sued upon. To hold that such use of the money made appellant principal on the note sued upon would be in conflict with the rule declared in *Cupp v. Campbell*, *supra*, and the cases there cited.

Petition denied.

THE STATE v. BARNETT.

[No. 19,714. Filed November 25, 1902.]

156 432
150 606

CRIMINAL LAW — Purchasing Labeled Bottles.—Trade-Mark.—Indictment.—An indictment charging defendant with purchasing soda-water and mineral-water bottles with the intent to defraud the owner in violation of §8680b Burns 1901, must allege facts showing that the owner of the bottles, before the purchase, had fully complied with all of the requirements of §8678 Burns 1901, relative to procuring a trade-mark thereon. pp. 433-436.

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Phrases.—An indictment charging defendant with purchasing labeled bottles with intent to defraud the owner, in violation of §8680b Burns 1901, which charged that the offense was committed on the day the indictment was returned, and alleged that the owner of the bottles “then and there and theretofore” filed with the clerk a written description, etc., and the clerk “then and there” caused a certified copy of such description to be published for not less than two weeks, etc., is insufficient, since the words “then and there” imply that the act of compliance with the statute was done on the same day the offense was committed, and the publication for two successive weeks could not have been made before the offense charged was committed; and the words “then and there and theretofore” are contradictory, and leave the time of such filing uncertain. pp. 436, 437.

APPEAL AND ERROR.—Constitutionality of Statute.—Where an indictment was properly quashed for reasons other than that the statute on which it was based was unconstitutional, the question of the constitutionality of the statute is not presented on appeal within the meaning of §1337h Burns 1901. p. 438.

From Marion Criminal Court; *Fremont Alford*, Judge.

Moses Barnett was indicted for purchasing labeled bottles with intent to defraud the owner. From a judgment quashing the indictment the State appeals. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *J. C. Ruckelshaus*, *J. B. Kealing*, *M. M. Hugg*, *W. W. Woollen* and *Evans Woollen*, for State.

W. N. Harding, *A. R. Hovey* and *C. S. Wiltsie*, for appellee.

MONKS, J.—Appellee was indicted for having “bought 500 soda-water and mineral-water bottles, the property of one Patrick W. Ward, with the intent then and there and thereby to defraud the owner” of said bottles, in violation of §5, Acts 1897, p. 316, §8680b Burns 1901. On motion of appellee the indictment was quashed and he was discharged from custody. The State claims that the court sustained said motion to quash on the ground that said

section, and the act of which it forms a part, were unconstitutional and void.

This appeal was taken under §8 of the act of 1901 (Acts 1901, p. 566, §1337h Burns 1901), for the purpose of presenting the question of the constitutionality of said act of 1897, *supra*.

Section 5 of said act of 1897, §8680b Burns 1901, provides that, "It is hereby declared to be unlawful hereafter for any person or persons, company, firm, corporation, or association, without the written consent of the owner or owners thereof, to fill or cause to be filled with mineral water either natural or artificial, cider, beer, ale, ginger pop, soda water, distilled water, ginger ale, seltzer water, or other beverages described in §1 of this act, any bottle or bottles or siphons belonging to or owned by any person, company, firm, corporation or association that has complied with the provisions of §1 of this act; or to sell, cause to be sold; disposed of or caused to be disposed [of]; buy or cause to be bought, with the intent to defraud the owner or owners of such bottle, bottles or siphons; traffic in or cause to be trafficked in, or to wantonly destroy or cause to be wantonly destroyed, any bottle or bottles or siphons mentioned and described in and protected by §1 of this act, not purchased from the owner or owners thereof, after the owner or owners thereof have complied with the provisions of §1 of this act; and every person or persons, firm, corporation or association that shall violate any provision of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined a sum of \$1 for every bottle or siphon so filled or cause to be filled, sold or caused to be sold, disposed of or caused to be disposed of, bought or caused to be bought with the intent to defraud the owner or owners thereof, trafficked in or caused to be trafficked in, wantonly destroyed or caused to be wantonly destroyed; and a fine of \$5 for every subsequent offense as herein defined, such fines to be recovered and enforced as other fines

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are now recovered and enforced by law. All fines so recovered when collected, shall be paid over to the school fund."

It is clear that an indictment under said section would not be sufficient if, after charging that appellee bought bottles of the kind mentioned in said section with intent to defraud the owner thereof, it failed to allege facts showing that the owner of said bottles had, before said purchase, fully complied with all the requirements of §1 of said act (§8678 Burns 1901). Gillett, Crim. Law (2d ed.), 135. Said §8678 reads as follows: "That any person, company, firm, corporation, or association, foreign or domestic, engaged in the business of manufacturing, bottling or selling mineral water either natural or artificial, cider, ale, beer, ginger pop, soda water, distilled water, ginger ale, seltzer water and other beverages, also fermented liquors, by law allowed to be sold in bottles or siphons, upon which his, their or its initials, name or names, mark or marks, trade-mark or marks shall be respectively impressed, stamped or marked or blown into, for the purpose of protecting the ownership of such bottles or siphons, may file in the office of the clerk of the circuit court of the county in this State in which is situated the principal office or place of business of such person, company, firm, corporation or association, or in any other county where such person, company, firm, corporation or association, has or have an established agency or office, for the purpose of carrying on his, their or its business as aforesaid, a written description of the initials, name or names, trade-mark or trade-marks impressed, stamped or marked upon, or blown into, the body of the bottles or siphons used by such person, company, firm, corporation or association in the business of manufacturing, bottling or selling mineral water and the other products before mentioned herein; such description must be recorded in said clerk's office in a book provided therefor, and the clerk shall receive the sum of \$1 for recording the same; said clerk

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must cause a certified copy of such description to be published for not less than two weeks successively in a daily or weekly newspaper of general circulation published in the county where said description is recorded, or if none such is published, then in any weekly newspaper of general circulation published nearest to said county, and an affidavit of the publisher or his principal foreman stating the facts of such publication, shall be sufficient proof of such publication in any court in this State. Such description must also be filed in the office of the Secretary of State, and be by him recorded, and such Secretary shall receive a fee of \$2 for such recording."

The indictment in this case was returned by the grand jury on February 14, 1901, and it is alleged therein that the offense was committed on February 14, 1901, in Marion county, Indiana. The filing, recording, and publication of the description mentioned in said section are alleged as follows: "The said Patrick W. Ward having then and there and theretofore * * * filed with the clerk of the circuit court of Marion county, in the State of Indiana, a written description * * * and which said description was recorded by said clerk of the circuit court of Marion county, in the State of Indiana, in a book provided therefor. * * * And the said clerk of said circuit court of Marion county, Indiana, then and there caused a certified copy of such description to be published for not less than two weeks in 'The Daily Reporter' a daily newspaper of general circulation printed and published in said county and State. * * * Such description * * * was then and there also filed in the office of the Secretary of State of the State of Indiana, and such description was by said Secretary of State then and there recorded."

The rule is that when an act is done and time and place alleged, and it is averred that then and there another act occurred, and other acts are alleged in the same manner, this necessarily imports that all the acts were coexistent,

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that they occurred at the same time. The word "then" refers to a precise time. *Edwards v. Commonwealth*, 19 Pick. 124, 126; *Commonwealth v. Butterick*, 100 Mass. 12, 16, 17, 97 Am. Dec. 65; *State v. Cunningham*, 116 Ind. 209, 213; *State v. Cotton*, 24 N. H. 143, 146; 25 Am. & Eng. Ency. Law, 1056; 10 Ency. Pl. & Pr., 519; Gillett, Crim. Law (2d ed.), 134, 135.

It is evident that if the words "then and there" only had been used in alleging the time of compliance with the provisions of said §1 of said act, the indictment would have been insufficient. The use of only the words "then and there" would in effect have charged that the acts of compliance were done on the same day the offense was committed. If the said written description was filed and recorded on February 14, 1901, the day the offense was committed, the publication of the certified copy of said description for two weeks successively could not have been made before the offense charged here was committed.

It will be observed that in alleging the first act done, to comply with the provisions of said §1, the words "then and there and theretofore" are used, and that in alleging all other acts of compliance the words "then and there" are used. But one filing is alleged with the clerk, and that is alleged to have been made "then and there and theretofore." This allegation is contradictory and leaves the time of such filing uncertain. If appellee committed the acts charged before the owner of said bottles complied with all the requirements of §1 of said act, §5 of said act was not violated, and no offense was committed. Said indictment was clearly insufficient, and charged no offense against appellee, even if said act is constitutional, for the reason that the allegations thereof do not show that the owner of said bottles had complied with all the requirements of said §1 before the acts charged against appellee were committed.

It is alleged that the written description was filed "with the clerk of the circuit court" and "recorded by the said

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clerk of the circuit court * * * in a book provided therefor," and that "the said clerk * * * then and there caused a certified copy of such description to be published for not less than two weeks." Said §1 requires that said description be filed "in the *office* of the clerk of the circuit court" and "recorded in said *clerk's office* in a book provided therefor," and that "a certified copy of such description be published for not less than two weeks *successively*." As the indictment is bad for the reasons given, it is unnecessary to consider the sufficiency of the said allegations concerning the place of filing said description and the length of time of its publication.

It is evident that the constitutionality of said act of 1897, pp. 313-316, §§8678-8680c Burns 1901, is not presented by this appeal, within the meaning of said §8, *supra*. *State v. Wright, ante*, 394; *Standish v. Bridgewater, ante*, 386.

Appeal dismissed.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD
COMPANY v. STATE, EX REL. KETCHAM,
ATTORNEY-GENERAL.

[No. 19,728. Filed November 25, 1902.]

CORPORATIONS. — *Charter.* — *Amendments.* — *Railroads.* — The act of 1897 (Acts 1897, p. 59) amending the act of 1847 (Local Laws 1847, p. 77), creating a corporation with power to construct a railroad, providing for an accounting to the use of the common schools, authorizing the Attorney-General to demand such accounting, and to institute suit upon failure so to do, is valid as providing a remedy for enforcing the preëxisting charter obligations of the corporation. pp. 444, 445.

SAME. — *Railroads.* — *Dividends.* — *Tolls.* — *Regulation by State.* — *Statutes.* — The provision of section twenty-three of the act of 1847 (Local Laws 1847, p. 77), creating a corporation with power to construct a railroad, "that when the aggregate amount of dividends declared shall amount to the full sum invested and ten *per centum* per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen *per centum* per annum shall be divided on the capital employed, and the surplus profits, if any,

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after paying the expenses and reserving such portion as may be necessary for future contingencies, shall be paid over to the Treasurer of State for the use of the common schools," etc., does not require the legislature, as a condition precedent to the State's right to the earnings in excess of fifteen *per centum*, to regulate the tolls and freights of the company. pp. 445-456. 3

CORPORATIONS. — *Railroads. — Charter. — Construction. — Capital Employed.* — The words "the full sum invested" and "capital employed" as used in section twenty-three of the act of 1847 (Local Laws 1847, p. 77), providing that when the aggregate amount of dividends declared by the railway company created by the act shall amount to "the full sum invested" the legislature may so regulate the tolls and freights that not more than fifteen *per centum* shall be divided on "the capital employed" embraces only such sums as were contributed directly by those who purchased the corporation stock for the construction of the road and the sum paid for bonds that were issued and used for construction and subsequently converted, under their provisions into shares of stock. pp. 456-461. 61

JUDGMENT. — *Res Judicata. — Defective Complaint. — Corporations. — Railroads.* — Where by the provisions of a statute authorizing the creation of a corporation with power to construct a railroad, it was provided as a condition precedent to any duty on the part of the corporation to pay or account to the State for money received that certain collateral things were to be done, such as building the road, earning money, paying expenses, making repairs and improvements, restoring the sums contributed for construction and equipment, reserving a sufficient sum to meet future contingencies and providing a fifteen per cent. current dividend, no duty was imposed upon the corporation to make an accounting to the State until requested by the proper authorities, and a judgment in favor of the corporation upon a complaint by the State for an accounting, in which no demand was alleged, does not constitute an adjudication of a proper suit by the State for an accounting. pp. 461-467. 5

SAME. — *Res Judicata. — Defective Complaint.* — A judgment for defendant, on demurrer to the complaint, by reason of the omission of an essential allegation therein, will not bar a subsequent suit upon a complaint in which the omitted allegation is supplied. p. 470. 1

SAME. — *Res Judicata. — Action Prematurely Brought.* — A judgment against a plaintiff because his action is prematurely brought will not bar a suit subsequently brought after the cause of action has properly accrued. p. 470.

SAME. — *Res Judicata. — Form of Complaint. — Evidence.* — Where judgment was rendered for defendant on demurrer to a complaint on the ground that the complaint failed to state a cause of action, 2

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no error was committed in refusing to admit in evidence, in a subsequent action involving the same subject-matter, the written opinion of the judges who sat in the former case to show that the judgment was in fact upon the merits, and not upon the form of the complaint. pp. 471, 472.

JUDGMENT.—*Res Judicata.*—*Evidence.*—No error was committed in the trial of an action by the State against a railroad company for an accounting in refusing to admit in evidence an agreement between the company and the State to submit the question of the company's liability in the former action as tending to show a former adjudication; since the agreement was to submit the State's claim upon the facts as they existed at that time, not as it was after more profits had been received and a cause of action accrued. pp. 472, 473.

CORPORATIONS.—*Railroads.*—*Amendment of Charter.*—The amendment of 1851 (Local Laws 1851, p. 80), of the act of 1847 (Local Laws 1847, p. 77), creating a corporation with power to construct a railroad, and imposing certain obligations, whereby the corporation was relieved of the construction of a portion of the road and the power conferred upon another corporation upon the request of the former, and the acceptance by such corporation in 1878 of the general railroad law of 1852, did not relieve the corporation from unperformed duties assumed by it under its charter contract of 1847. pp. 473, 474.

LIMITATION OF ACTIONS.—*Charter of Railroad Company a Written Contract.*—A special charter granted by the State authorizing a company to construct a railroad, constituted a written contract, without the written acceptance on the part of the company, where the company acted under the charter, exercised the right of eminent domain, took possession of real estate, constructed a railroad and operated it; and an action thereon is not barred by the six years' statute of limitation (repealed as to the State in 1881). pp. 474-476.

SAME.—*Officers.*—*Laches.*—A suit by the State against a railroad company created by the act of 1847 (Local Laws 1847, p. 77) to recover surplus profits, is not barred by laches on the part of the State's officers to recover the same. p. 478.

TRIAL.—*Special Findings.*—*Request for.*—*Master Commissioner's Report.*—The signed writing or record of a trial judge, containing the approved and disapproved items of a master commissioner's report of a suit in equity against a railroad company for an accounting, and the conclusions of law stated in ruling upon exceptions thereto, made without request by either party for a special finding, is a general finding only, and specific findings and rulings can form no basis for appealable error. Jordan, J., dissents. pp. 479, 480.

SAME.—*General Finding.*—*Appeal and Error.*—Where in an action by the State against a railroad company created under the act of

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1847 (Local Laws 1847, p. 77), for the recovery of surplus profits under the provision of the statute, there was a general finding for the State for a designated sum without disclosing in detail the conclusion reached by the court, and enough of the items sued for are sustained by the evidence to equal the amount of the recovery, it is immaterial whether certain taxes paid by the corporation were paid as an excise on the earnings, and so a charge against the corporation, or a tax on the dividends declared, and therefore a charge against the stockholders. Jordan, J., dissents. p. 483.

TRIAL.—*Master Commissioner.*—The action of the trial court in referring a suit, brought by the State, under the act of 1847 (Local Laws 1847, p. 77), against a railroad company for the recovery of surplus profits, as in the act provided, to a master, was not error. p. 487.

From Marion Superior Court; *Vinson Carter*, Judge.

Suit by the State on the relation of W. A. Ketcham, Attorney-General, against the Terre Haute and Indianapolis Railroad Company for an accounting. From a judgment for plaintiff, defendant appeals. *Affirmed.*

J. G. Williams, S. N. Chambers, S. O. Pickens, C. W. Moores and Lawrence Maxwell, Jr., for appellant.

W. A. Ketcham, R. S. Taylor, R. O. Hawkins and F. Winter, for appellee.

HADLEY, C. J.—Suit by appellee for an accounting, to the use of the common schools, for earnings in excess of amount authorized by law.

The facts material to a decision of the case not disclosed in the opinion are these: The General Assembly by an act approved January 26, 1847 (Local Laws 1847, p. 77), constituted a number of gentlemen named, and their successors in office, a body corporate and politic under the name of "The President and Directors of the Terre Haute & Richmond Railroad Company" with full power to construct and operate a railroad from a point on the western line of the State of Indiana, and running thence eastwardly through Terre Haute, Greencastle, and Indianapolis to Richmond, in Wayne county. The authorized capital was \$800,000, which might be increased if found necessary.

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The corporation might borrow money, but no power was given to mortgage its property; and if the directors contracted debts beyond the amount of the good solvent subscriptions to the capital stock, such directors should be personally liable. The corporation might fix its own rates for the transportation of freights and passengers, and when the stockholders should receive as dividends an amount equal to the full sum invested, and ten per cent. per annum, the legislature might then regulate the tolls, and all net profits thereafter accruing, above a sum sufficient to pay fifteen per cent. dividends, and to meet future contingencies, should be paid to the Treasurer of State for the use of common schools.

In 1851 the corporation was authorized to mortgage its property to raise money for construction and equipment, and at the same session (Local Laws 1851, p. 80), upon solicitation of its officers, the company was relieved from the construction of that part of the proposed road east of Indianapolis. In 1865 the corporation name was changed to "The Terre Haute & Indianapolis Railroad Company," which name it still retains. The road was opened to traffic in the fall of 1851 between Terre Haute and Indianapolis. Improvements, however, were continued through the years 1852, 1853, 1854, and 1855, and to November 30, 1856, when the construction account was declared closed. The company commenced paying dividends to its stockholders in 1852, and in every year thereafter to 1873, when it surrendered its special charter and organized under the general railroad laws of 1852, paid regular and large extra dividends.

About the close of 1872 the prosecuting attorney of Putnam county instituted a *quo warranto* proceeding in the Putnam Circuit Court to forfeit the charter of the company. On a change of venue to Owen county, a trial was had which resulted in a disagreement of the jury. Pending this action a written agreement was entered into between

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the State and appellant, which stipulated that a suit should be brought in the Marion Superior Court for any money claimed to be due the State, and if it should be determined in said suit that nothing was due the State from appellant, then the *quo warranto* action in the Owen Circuit Court should be dismissed; and if it should be found that money was due the State, the sum so found should be paid before the dismissal of said suit. Pursuant to this agreement the State, *ex rel* the Attorney-General, brought suit against appellant in the Marion Superior Court in 1875. The complaint contained three paragraphs. The first and second paragraphs sought to recover money due the common school fund under the twenty-third section of appellant's charter. The third paragraph sought to recover money paid by the State to appellant for the transportation of troops and munitions of war. Appellant filed a demurrer to each paragraph of that complaint for insufficiency of facts, and each of said demurrers was sustained; the judges filing a written opinion in which they purported to state the grounds of their judgment. The State refusing to amend, judgment was rendered in favor of the company on the demurrers. On the State's appeal to this court, the judgment of the superior court was affirmed in 1878 on the ground of irregularity and insufficiency of the record. *State, ex rel., v. Terre Haute, etc., R. Co.*, 64 Ind. 297.

In 1897 the legislature passed three acts,—one, approved January 27th, to require appellant to account to that body pursuant to section twenty-three of its charter, for the amount expended in construction and operation of its road from January 26, 1847, to January 17, 1873, and the total earnings, profits, etc., for that period; one, approved February 24th, purporting to amend said original section twenty-three so as to require the excess of profits paid over to the Treasurer of State semiannually on the first Monday of July and December; and the third approved March 4th, providing for an accounting to the use of the common

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schools, authorizing the Attorney-General to demand such accounting, and to institute suit upon failure so to do. Acts 1897, pp. 8, 59, 145.

The appellant neglected to render an account, and pursuant to this latter legislation this action was commenced in April, 1897. The complaint is in one paragraph, reciting the above and other material facts with much elaboration. A demurrer for want of facts was overruled, and appellant answered in eleven paragraphs. The first was a general denial. The second set up the legislative consent of 1851 to the company's abandonment of the construction of that part of the proposed railroad lying east of Indianapolis, and appellant's acceptance of the general railroad law of 1852 in bar of the State's right to recover. The third pleaded the judgment in the Marion Superior Court of 1876 as a former adjudication. The fourth was an argumentative denial. The fifth, sixth, seventh, eighth, ninth, and tenth presented the statute of limitations in various forms; the ninth that the cause of action accrued more than twenty years prior to the 19th day of September, 1881. The eleventh, acquiescence and laches on the part of the State, in bar of the action. A demurrer was sustained to each paragraph of the answer except the first, third, and ninth. A reply was filed to the third and ninth. Upon the closing of the issues the case was referred, over the objection of appellant, to a master commissioner, to hear and report to the court the evidence, together with his findings of fact and conclusions of law thereon. Exceptions were filed to the master's report by both plaintiff and defendant, and upon final hearing by the court, judgment was given the plaintiff for \$913,905. A new trial was denied the defendant, and it appeals. Errors and cross-errors are assigned on all adverse rulings.

The State's action is based upon the obligations assumed by appellant in the acceptance of its original charter of 1847, or it has no case. This, in effect, is conceded by

the State's counsel. An effort of the General Assembly, by amendatory legislation in 1897, to create in the State a right in the earnings of appellant, where none existed before, or to impose upon appellant any new charter liability or obligation, would be so clearly unconstitutional as to leave no ground for argument. We are, therefore, inclined to dismiss the first contention with the observation that in so far as either of the acts of 1897, *supra*, attempts, if either does so attempt, to increase the liabilities, or impose any new burden upon, or in any way change the obligations of, appellant, the same is invalid, and the respective rights and liabilities of the parties must now be determined by their contractual relations entered into in 1847, in the same way as if the legislation of 1897 had never been enacted. However, as we read the complaint and understand the theory of the State, the late legislation is appealed to only as providing a remedy for enforcing the preëxisting charter obligations of appellant, and to this extent it is valid. *Cincinnati, etc., R. Co. v. Clifford*, 113 Ind. 460-466; *Webb v. Moore*, 25 Ind. 4; *Hopkins v. Jones*, 22 Ind. 310-315.

We pass, then, the legislation of 1897, as being out of the case, except as conferring certain powers upon the Attorney-General, and as defining the procedure whereby the claims asserted by the State, as arising under the original charter, may be fully and fairly contested with appellant. The sections of the charter important in this inquiry are these:

"Section 22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities, and carriages on said road, or any part thereof, as shall be for the interest of said company, and to charge, lower, or raise at pleasure: Provided, that the rates established from time to time shall be posted in some conspicuous place or places on said road.

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"Section 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten *per centum* per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen *per centum* per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid over to the Treasurer of State, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen *per centum* per annum cannot be made; and it shall be the duty of the corporation to furnish the legislature, if required, with a correct statement of the amount of expenditures and the amount of profits after deducting all expenses; which statement shall be made under the oath of the officer whose duty it shall be to make the same.

"Section 24. Semiannual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July, annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all expenses; and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper."

"Section 35. The corporation shall cause to be kept a fair record of the whole expense of making and repairing said railroad, and of each section thereof, with all the incidental expenses, and also a fair account of the tolls received; and the State shall have the right to purchase the stock of said company, at any time after twenty-five years, by paying to said corporation a sum of money which, together with the tolls received, shall equal the cost and expenses of said railroad as aforesaid, with an interest of

ten *per centum per annum*; and the books of said company shall always be open for the inspection of any agent of the State, appointed for that purpose by the legislature, and upon any refusal to exhibit their books and accounts to said agent, upon request made to the president, all powers granted by this act shall cease."

Section thirty-five was repealed by the act of February 16, 1848, but we deem it useful here in the interpretation of other sections.

Three important questions arise upon the construction of these sections, and chiefly under section twenty-three: (1) Does said section impose upon appellant any obligation to pay any portion of its net earnings to the State, in the absence of legislation regulating its tolls and freights? (2) What is meant by the term "full sum invested,"—the sum subscribed and paid in by the stockholders, and such of the bondholders as elected to convert their bonds into stock, and thus become stockholders, or the full cost of construction and equipment of appellant's road, without reference to whether the money employed was taken from the surplus earnings of the corporation, or directly contributed by the shareholders? (3) Was an action maintainable by the State for surplus earnings before a demand for an accounting had been made and refused?

I. The first of these questions involves the sufficiency of the complaint. It is averred therein that the legislature never regulated the tolls and freights to be charged by appellant, and the question is, was such regulation required by the charter as a condition precedent to the State's right to the earnings in excess of the amounts specified? It is obvious from the sections quoted that the lawmakers had in mind a scheme which contemplated, not only liberal profits to investors, but, as well, security to the public against extortion, and a contingency in which the common school fund should become entitled to share in the profits of the enterprise. The provisions of these sections may be

better understood by looking at them from the point of view held by the legislators at the time of their enactment. Since the occupation of the territory the people of the State had sorely felt the need of highways as means of intercommunication, and for reaching the markets. At that time perhaps more laws had been passed by the legislature relating to roads than had been passed upon all other subjects combined, and to meet the still pressing demand the State in 1836 had undertaken a general system of public improvements which provided for the construction of many highways, including turnpikes, canals, and railroads. This venture on behalf of the State had proved disastrous, and all the work begun thereunder had been abandoned as early as 1842, leaving the State with a prostrate credit, and unsupplied with necessary highways.

Furthermore, popular education had also been a matter of chief concern. In the organization of the State government in 1816, the people had declared, as a part of their fundamental law, for a public school system in which instruction should be free and equally open to all. Const., Art. 9, §2. Subsequent legislation in accord with this constitutional requirement had given unmistakable prominence to the desirability of free schools. Most, if not all, of the financial resources of the State, other than taxation, had been and were being appropriated to the accumulation of a permanent fund for the maintenance of such schools. Here, then, we find the legislature confronted with a popular demand for more highways and a more ample school fund. The State could neither build roads nor appropriate school funds. She had no money and no credit. Private capital must be induced to engage in such enterprises.

Railroads, as freight carriers, were at the time attracting prominent attention. Massachusetts had led in 1826 in the construction of the first railroad in America, the same being a line from Quincy to tidewater, and so rapidly had such roads arisen in favor, that in 1847 there were in suc-

cessful operation more than 5,000 miles of railroad in the Eastern and south Atlantic states. Appleton's Am. Cyc., Vol. 14, 172. Our own State had felt the impulse of railroad building. No less than twenty-five charters for the construction of railroads had been previously granted, but none had proceeded to completion. In 1836 in its great system of internal improvements, the State had provided for the construction of a railroad from Madison to Lafayette, *via* Columbus, Indianapolis, and Crawfordsville, thus opening up to general markets, through the Ohio river, and the Wabash and Erie canal, three populous and fertile sections of the State. The latter work was entered upon, but the State finding that it had undertaken more than it was able to accomplish, in 1843 turned over to a private corporation the incompleted portion between Madison and Indianapolis. The receiving company's president, in February, 1846, reported to his board of directors that the road still lacked thirty miles of reaching Indianapolis. It was probably completed in that year.

So it may be assumed that the legislature of 1847, convening so shortly after the opening of the first railroad in the State, while in a mood to give friendly consideration to the proposals of a body of men to build, with their own money, a railroad through another important section of the State, yet the members were undoubtedly without the necessary *data* as to cost of construction and equipment, expenses of operation, and earnings, of railroads, to enable them to settle upon definite terms and franchises, fair alike to the corporation and the public. There existed reasons, too, why an east and west line across the State from Terre Haute to Richmond should be regarded as the most profitable line in the State for a railroad. The route for the entire distance paralleled the National road, a great thoroughfare previously constructed by the federal government, eighty feet wide from Maryland to the Mississippi river, thus furnishing the rapidly increasing population of the

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seaboard a spacious highway into the broad and fertile regions of the West. Along this only way the stream of emigration had flowed for several years. Cities, towns, and populous communities had gathered along its borders. New settlements sought continuity with it. National attention had been drawn to it as the only highway between the East and the West under the fostering care of the national government. The proposed new railroad was thus to run along the channel of direct commerce and communication, as fixed by congress, between the Atlantic and Mississippi valley, and would be the first to enter the open door of the great prairies of Illinois.

At any rate, when the subject came up the legislators were not so swerved by their enthusiasm for railroads as to make reckless concessions to the incorporators; for, liberal as they were required to be, and were, to induce the investment of private means in a novel venture, it is very plain that they had, from present considerations of some character, confidence enough in the ultimate profits of the enterprise to set a limit to the corporation's money-making. The paramount consideration, doubtless, was such a scheme as would attract private capital. Here are some of the inducements held out to investors: (a) The company was to have, at the beginning of business, unrestrained power to charge such rates for the transportation of freights and passengers, as seemed to it to be to the interest of the company, and power to raise and lower such rates at pleasure. §22. Under this power it could have been pointed out that the managers of a railroad, susceptible of easy and inexpensive construction, linking the West to the East, tracing the thickly inhabited border of the National road, touching at the State's capital, could unquestionably so adjust its tariffs as to meet the requirements of a satisfactory investment. (b) In effect the State proposed to suspend the exercise of its sovereignty, and allow the company to continue uncontrolled and uncontrollable in its exactions from

the people, until the investors had received back as dividends the full sum invested, and ten per cent. per annum thereon, and thereafter to continue in perpetuity to charge and collect such tolls as would net them two and one-half times the legal rate of interest. (c) The State guaranteed that the company should enjoy in perpetuity the right to charge such tolls as it liked, upon failure of the builders to receive back as dividends the full sum invested and ten per cent. thereon, and, if at the end of twenty-five years (§35) the State elected to purchase the road, it could do so only by paying the stockholders the full *cost* of the road and ten per cent. thereon. (d) The State should never, even after the builders had been fully reimbursed, interfere in the matter of charges so as to reduce the profits of the stockholders below fifteen per cent. per annum.

The legislature was not free to do as it would. It had to do the best it could. The State's effort at making public improvements had irretrievably failed. Private capital must be enlisted, or the people do without railroads. The best offer to make was one that would promise investors the speediest and surest return of their money, and, to that end, give them the most absolute control of the means by which the money was to be made. That accomplished, other interests might then be protected. So it was provided (§23) that when the stockholders had been reimbursed, and had received back all they had put in, and ten per cent. per annum thereon, and still retain their shares, the State should then become entitled to resume its sovereignty, and the cherished school fund afforded a chance for enlargement. The language is that when the money invested, and interest, has been fully returned "the legislature may so regulate the tolls and freights that not more than fifteen *per centum* per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving [reserving] such proportion as may be necessary for future contingencies, shall be paid

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over to the Treasurer of State, for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen *per centum per annum* cannot be made."

The situation of the legislature was unique. The fiscal depression that followed the collapse of the State's recent undertakings had not been restored. The people were clamoring for better ways for reaching the markets. The expenses and earnings of a railroad were problematical. How generally the people would patronize the road was only conjectural. The profits might be small or very large. One seemed as probable as the other, and when the inducements had been made sufficiently strong to assure the investment of private capital on the basis of small profits, then, on the basis of possible large profits, there arose the twofold duty of protecting the people from continued wrong and oppression, and to secure for the State something valuable for the large franchises granted. Reasonable capitalists would not hesitate to accede to such terms when it was provided that they should operate only after the investors had received back all their investments, with interest largely in excess of the legal rate. With these various interests, objects, and purposes in view the plan outlined in section twenty-three was adopted.

At least three reasons appear for believing that the intention was that the stockholders should not, after becoming reimbursed for their outlay, at any time or under any conditions, have more of the net earnings than fifteen per cent. per annum of the sum invested: (1) The irrevocable right to fifteen per cent., expressly conferred, negatives a right to more. (2) The faithful account of construction, of expenses and receipts, required by sections twenty-three and thirty-five, and the mandatory language employed in disposing of "the surplus" implies the contemplated existence of a substantial balance. It seems entirely improbable that the legislature intended the mockery of pro-

viding for the payment to the school fund of the fraction remaining after that body had adjusted the tariffs of the company, so that the net earnings should be just fifteen per cent. of the shareholders' investments,—no more and no less. (3) It is clear that the lawmakers considered that under their liberal grant the time might come when the corporation would be receiving larger profits than were just, and when that time arrived, if ever, any earnings in excess of fairness should be relinquished by it. The limitation that entered into this consideration is stated as affecting the periods both before and after full reimbursement of the builders, and it seems incredible that the legislators should deem it expedient to declare their sense of what was just and fair to the shareholders and State, dispose of the excess over the limit fixed by them, and then provide, or leave for construction, that the company's right to the unjust excess should accrue by legislative inaction on the subject of regulating its tolls

But it is argued that the statute required the legislature to regulate the tolls and freights of the company, as a condition precedent to the State's right to the earnings in excess of fifteen per cent.; and in support of the contention it is insisted that "may so regulate," as used in section twenty-three, should be read, "shall so regulate." We are unable to accept the argument as sound. If "may" should be construed as mandatory, when shall the legislature begin to act? The statute says "when the aggregate amount of dividends declared shall amount to the full sum invested and ten *per centum* per annum thereon" shall be the time when the legislature may begin regulating the tolls. It is certain, however, that conditions might be such at that time, and ever after, for that matter, that the legislature would have no power to act. The stockholders might have reached reimbursement by earnings less than fifteen per cent. per annum, and the time might never come when they earned so much as fifteen per cent. per annum, and hence the

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power to regulate, declared to exist, would be, and might ever continue to be, without the right of exercise, and therefore a nullity, for it is expressly provided in the same section "that the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen *per centum per annum* can not be made." The legislature will not knowingly command a thing to be done that is impossible of accomplishment, nor will it wittingly command a thing to be done that ought not to be done.

Perchance it might happen when the time came that the stockholders had received back their full investment, and were continuing to receive more than fifteen per cent. per annum, that the State ought not to change the established and prevailing rates of the company. It should be borne in mind that the right to regulate was primarily intended for the protection of the people. All the protection the people were entitled to was fair rates, as compared with the rates elsewhere charged on other roads over the country. The railroad company might find from experience that the friendship of the communities traversed was valuable, and that the interest of the company lay in such fair rates as would invite business and stimulate trade. So when the legislature became entitled to interfere it might find a schedule of rates in force by the company that was perfectly fair and perfectly satisfactory. In such case will it be said that it was meant that the legislature should change it?

Then, again, as we have seen, the proposed road would occupy a route of exceptional advantages for business,—advantages apparently so favorable that a schedule of charges, fair and necessary on other railroads in the State, might, upon this, prove sufficient to produce an income in excess of fifteen per cent. In such case was it intended to make it the duty of a subsequent legislature to reduce the rates of the company to the lowest point at which fifteen per cent. could be made? It is the duty of the State to treat its citi-

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zens alike, and to see that others who exercise public powers do the same. So when the State should undertake to regulate the tariffs of its railroads, it must make such tariffs uniform. It could not require the people between Indianapolis and Terre Haute to pay one mileage rate, and the people between Indianapolis and Madison to pay another. If the legislature should find such facts existing with respect to rates, when the State regained its power of supervision, there would exist not only no duty to change the rates it found in force, but it would be wrongful to change them. Will it do to believe that it was meant by the legislature, in the adoption of appellant's charter, or so understood by the incorporators at the time of its acceptance, that, if it should turn out that fair rates formulated and established by the company should produce more net profits than fifteen per cent. of the investment, the State must go through with the form of adopting and enacting into law the same fair rates, to acquire a right to the surplus? The intent of the law is the law.

The reasonable and true interpretation of the provisions under review seem to be: (1) That the matter of regulating the tolls and freights of appellant, at any permissible time, rested solely in legislative discretion; (2) the incorporators were absolutely limited in the profits of the enterprise, to the full sum invested, and ten per cent. per annum thereon, and thereafter to an annual dividend of fifteen per cent. upon the capital employed; (3) when the stockholders had received the limit, the surplus, if any, remaining after the payment of expenses, and reserving such an amount as shall be necessary for future contingencies, should be paid over to the Treasurer of State for the use of the common schools, without reference to whether the legislature had, or not, previously regulated the tolls and freights of the company. "A doubtful charter does not exist; because whatever is doubtful is decisively certain

against the corporation." *Commonwealth v. Erie, etc., R. Co.*, 27 Pa. St. 339, 351, 67 Am. Dec. 471; *Holyoke Co. v. Lyman*, 82 U. S. 500, 511, 21 L. Ed. 133; *Covington, etc., Co. v. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Stourbridge Canal Co. v. Wheeley*, 2 Barn. & Ad. 792; *Thompson, Corp.*, §5661.

II. A spirited controversy prevails upon what is meant by "the full sum invested" and "capital employed" as used in section twenty-three. The State's insistence is that the term embraces only such sums as were contributed directly by those who purchased the corporation stock for the construction of the road, and the sum paid for bonds that were issued and used for construction, and subsequently converted, under their provisions, into shares of stock, amounting in the aggregate to \$1,216,690. On the other hand, appellant insists that the term means the full cost of the construction and equipment of the road, whether contributed directly by the stockholders or taken from the earnings of the road, amounting in the aggregate to \$1,988,150. If the State's contention is right, there was received and appropriated by appellant, in excess of the amounts to which it was entitled under its charter, a large sum of money; and if appellant's contention is right, it received no more money than it was entitled to retain. In the solution of this question we should again turn to 1847 and consult the history of the time. We should find that modern methods of railroad promotion and construction were unknown at that period. It was then understood that the only way to get a railroad was for those desiring it to get together the money and build it, as they would buy a farm. Bonds predicated on future values and incomes, and construction companies distinct from the principal corporation, were unknown attributes of railroad construction.

It is clear that the General Assembly assumed that the entire cost of construction should be subscribed and furnished by the stockholders, except such sums as might be

received as gifts and donations. The act fixes the capital stock at \$800,000, and prescribes the manner in which it should be subscribed and paid. It authorizes county commissioners of counties traversed by the road to subscribe for their county such an amount of stock as they would deem proper. §26. If the capital granted should prove inadequate to accomplish the work intended, the corporation might increase it. §31. If the directors contracted debts over and above the amount of good and solvent stock subscribed, they should be personally liable for the excess. §36. The work should commence within five years after the opening of the books, and should proceed towards the point of destination as might be within the ability and for the interest of the company, and should be completed within fifteen years. "Provided, also, if any part of said road shall be completed within the time aforesaid, in that case all the rights, privileges and benefits granted in this act shall be extended to and vested in said company to such part of said road as shall be completed." §19. The act did not originally authorize the company to issue bonds or mortgage its property for any purpose, but such power was subsequently conferred by amendment. Local Laws 1851, p. 28. The company was empowered to receive by donations, gifts, grants, or bequests, land, money, labor, property, stone, gravel, or other materials. §14. The improvement was to be made by the coöperation of interested parties along the line,—counties as well as individuals, who, for the money they put in, should have a certificate as evidence of the amount of their contributions. If persons along any part of the line, more liberal or more able than others, should succeed in completing that portion of the road, the full rights and benefits of the charter should apply to the completed portion, the same as to the entire line if completed. The thing in mind was to get the road completed as far as possible, and to make certain the security for the money put in to carry forward the improvement to that

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point of completion when it would serve the purpose of its construction. Profits or surplus earnings of an enterprise, so difficult of attainment as the road was supposed to be, could hardly have been reckoned upon as "money invested" or as "capital employed." The purpose was to provide the best possible security to capital that chanced the success of the venture, and not to remunerate capital that was earned after the success of the venture had become assured. It was the money put in, that made profits and dividends possible, that was to receive the special favor of the law, and be returned with ten per cent. per annum. In popular sense, "the full sum invested" and "capital employed," which are clearly used here as synonymous terms, usually means an original sum placed upon a venture with a view to profits or an income. If one has \$1,000 and with it purchases railroad or other stocks, it will be said that he has invested \$1,000. He has also acquired rights in the corporation other than a claim for money. He, to the extent of his investment, has become a part of the corporation, and a joint owner of its assets. If he receives and uses the annual profits of his stock, or if there are none, his investment is still \$1,000. If he permits the annual profits or accretions to remain and accumulate with the company, in whole or in part, the investment remains \$1,000. It can make no difference in the *status* of the profits whether he uses them himself, or allows the company to use them.

The money that was to be restored as "the full sum invested" was to be returned as "dividends declared" by the corporation. Dividends are declarable and payable only to stockholders; hence the only returnable money contemplated was that going to stockholders, and, we must assume, only to such stockholders as the legislature had in mind as contributors to the capital required in the first construction of the road. It was believed then that the capital required for the building and equipment of the road for practical use as a railroad, as they were then being constructed

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and operated, was the limit of capitalization. Such capital was the only money that would be subjected to any special hazard, or would deserve any special safeguarding, and there is apparent not the shadow of a reason why the law-makers should grant any special favoritism to surplus earnings of the road, subsequently expended by the corporation in permanent improvements and extensions.

We find further evidence that the legislature did not use "full sum invested" and "cost of the road" as equivalent terms. In section thirty-five it is provided that if, after twenty-five years, the State shall elect to purchase the road, there shall be paid to the stockholders, not the full sum invested or capital employed, but a sum equal to the *cost* and expenses of said railroad with an interest of ten per cent. per annum..

The aggregate amount of stock issued by appellant, and which, it insists, represents the cost of construction and the full sum invested, is \$1,988,150. Of this amount appellee disputes, as properly belonging to the full sum invested, within the meaning of section twenty-three, the following items:

Stock dividend November, 1856.....	\$211,600 00
Stock dividend April, 1864.....	376,700 00
Stock issued on account of bonds paid.	50,000 00
Stock issued on account of bonds lost..	5,000 00
Stock donated to Chancey Rose.....	6,000 00
Stock donated to John Rose.....	10,000 00
Interest and discount included in stock	112,159 95

Total\$771,459 95

In the annual report of the president of the road filed January 17, 1853, appears the following statement: "The road is amply equipped for the present, but will have to be increased in the coming season to enable us to meet the anticipated increase of business."

It thus appears that the road was in successful operation, and amply equipped for current business, four years before the first stock dividend was issued; hence no part of such stock could have represented an investment of the stockholders for construction. While the company had the right to appropriate from the earnings all necessary and proper operating expenses, including ordinary improvements, replacements, and repairs, whatever amount was earned in excess of such expenses, was pledged to the liquidation of the sum invested, and ten per cent. thereon, and as against the State no part of such expenses could be capitalized. It was never contemplated that earnings, in any form, should become a part of the full sum invested, in the sense that they should be returned with ten per cent. interest, and thereafter be entitled to fifteen per cent. annual dividends. Such reasoning leads to an absurdity.

There is less foundation for the stock dividend of 1864. The record shows that no charge was made to construction account during the eight years from 1856 to 1864, and hence the stock dividend of the latter date was simply a capitalization of the expense account that had been paid from the earnings. Will it be said that this should be done, as against the State? If it should, when will the time come, and what shall the earnings be, to accomplish a return of the capital and ten per cent. interest? It is certain that if the sums expended for betterments and improvements are to be considered, the construction of the road would never be completed, for the necessity for such things grow out of the operation of the road and will continue to arise as long as the road is operated.

The bond transactions have no greater merit. It appears that the company, in the ordinary course of business, had from its earnings paid off \$50,000 of its outstanding bonds, which had not been surrendered for stock, as they might have been. When the company had paid its own debt with its own money, that was the end of the matter. The trans-

action was an operating expense, and entitled to no other *status*. The issuing of the stock for the lost bonds was of the same general character. Ten thousand dollars in stock was issued to John Rose for services, "for which he makes no charge," and \$6,000 to Chancey Rose, on some unstated account, which, if a legitimate allowance, was also an operating expense, and should not be counted in estimating the amount to be returned to stockholders.

It appears that interest was allowed to subscribers to the capital stock upon all payments made in advance of the time when payments could have been called for by the directors. The stock was sold for less than its face value. Bonds were also sold at a discount. Certificates of stock were issued to subscribers without deducting the interest and discount allowed, and to the bondholders, upon the converting of their holdings into stock, for the full face value of their bonds, without deducting the discount received, aggregating the sum of \$112,159.95. This interest and discount was not capital invested in the improvement. It represented a sum that never in any way entered into the construction of the road, or into the assets of the corporation. It was an expense representing the cost of procuring the money for construction, — nothing more nor less. These sums deducted leaves the capital stock, which rightfully represents the full sum invested in the construction of the road, at \$1,216,690. See *Mobile, etc., R. Co. v. Tennessee*, 153 U. S. 486, 496, 14 Sup. Ct. 968, 38 L. Ed. 793; *State v. Manchester, etc., R. Co.* (N. H.), 48 Atl. 1103.

III. It is set up in the third paragraph of answer that on the 28th day of May, 1875, the plaintiff herein instituted a suit against this defendant, in the superior court of Marion county for the recovery of money; that the defendant appeared, and on the 8th day of June, 1875, filed its demurrer to the complaint therein; that on the 6th day of March, 1876, the demurrer was sustained, and thereupon the plaintiff, failing and refusing to amend, elected

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to stand by its complaint, and final judgment was thereupon rendered in the defendant's favor, May 9, 1876; that the judgment thus rendered was, by the plaintiff, appealed to, and affirmed by, the Supreme Court; that the matters adjudicated in said cause were and are the same identical matters sued for in this action. The pleadings disclose that the complaint in the Marion Superior Court contained no averment of conversion, or a previous demand upon the defendant for an accounting as to its earnings under the provisions of section twenty-three of its charter. It is insisted that for this omission the complaint in the former action was essentially bad, and hence there could be, and was, no adjudication upon it.

It is undoubtedly the general rule that, in ordinary obligations to pay money, it is the duty of the obligor, within the time for performance, to hunt his creditors up and pay or tender the sum owing, without a request or demand so to do, if he would escape costs of suit. But there are a great many cases, which, if not exceptions to the rule, are at least not governed by it, wherein, if money alone is due and owing to another, and the amount thereof definitely known, or ascertainable from facts within the knowledge of the obligor, it is essentially necessary to make a demand before an action can be maintained. Some of these cases follow. Generally, persons who come rightfully into the possession of funds in trust for others, are entitled to a request,—as agents, trustees, and bailees. *Armstrong v. Smith*, 3 Blackf. 251. Attorneys at law, for money collected by them. *Black v. Hersch*, 18 Ind. 342, 81 Am. Dec. 362. For the recovery of bank deposits. *Bank, etc., v. Merchants, etc., Bank*, 91 N. Y. 106; *Brahm v. Adkins*, 77 Ill. 263. For the recovery of dividends declared by corporations. 2 Morse, Banks and Banking (4th ed.), §708; *Hagar v. Union Nat. Bank*, 63 Me. 509; *Scott v. Central R. etc., Co.*, 52 Barb. 45. Where one makes a contract with another to pay the debts of the latter, before an action can

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be maintained against the former by a creditor a demand of payment is necessary. *Durham v. Bischof*, 47 Ind. 211. Where a general agreement is made to share future expenses, which are indefinite, no action will lie in favor of either party against the other until they have accounted, or until the account has been presented and its adjustment demanded. *Hayes v. Morrison*, 38 N. H. 90.

These are instances enough to show that the general rule is properly confined to narrow limits, and that a great mass of cases rest upon their own particular facts. It may be said that a demand is necessary in all cases where, from the peculiar nature of the transaction, the party to be charged may reasonably expect it, not from the known, or reputed forbearance of the promisee, but from facts that exist in the case, which naturally and usually influence persons in like situations to give notice. As an agent, attorney, bailee, or trustee, having had the right of possession conferred by another, may reasonably expect to continue in possession until its surrender has been requested by the party conferring or entitled to it. A banker, to avoid damage from unnecessary annoyance and costs, is entitled, from general custom, to a request to pay, before an action will lie against him for a deposit. So a corporation that has declared a dividend of profits among its stockholders cannot be sued until it has been requested and given a fair opportunity to pay without suit. All these and other like cases are grounded upon the principle that the obligor is ready and willing to perform at the convenience and pleasure of the obligee, whenever that pleasure is signified, and that fairness and good conscience require notice before legal proceedings shall be begun.

"There is, indeed, respectable authority," says Blackford, J., in *Sheets v. Andrews*, 2 Blackf. 274, "for the opinion, that it would have been better, had the law required a demand previously to a suit, even in cases where money only had been contracted for;" and that eminent

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jurist declares that the policy of the law in dispensing with a demand, where money only was promised, having been thus questioned, should be accepted as strong ground to show that the rule excusing a demand upon the obligor for performance, should be applied with great caution in all other cases.

There was something more in this case than a simple obligation and promise to pay money. As a condition precedent to any duty to pay or account for money received, certain collateral things were to be done that could be accomplished only by the coöperation of both parties to the contract. The railroad was to be built, money must be earned, expenses paid, repairs and ordinary improvements made, the sums contributed by the builders for construction and equipment must be restored, a sufficient sum to meet future contingencies reserved, and a fifteen per cent. current dividend provided. All the money the company should receive in the operation of its road from the beginning should be its property,—much or little. The right of the State at no time attached to any part of the earnings until after the company had paid its operating expenses, refunded the investment, set apart a sum for future contingencies, and provided a fifteen per cent. dividend on its proper capitalization. When these things were all done, if surplus profits remained, the duty of the company then arose to pay such surplus, as a surplus, to the Treasurer of State. But how was it to be known when these things were accomplished, and when liability to the State arose, without some basis or rule established or agreed to by the parties for making the estimate? Will it be seriously contended that the General Assembly conferred upon the corporation power arbitrarily to settle for itself and for the State what should constitute the “full sum invested?” What operating expenses, and what a reasonable sum for future contingencies? If it did, in the doing of it, it must have known that it was sheer folly to provide for the payment of a sur-

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plus to the State. To hold that it was given over to the company conclusively to resolve, as against the State, after the road was put in operation, that all betterments, extensions, and extraordinary improvements paid for from the earnings, and bonded indebtedness incurred for construction, but paid from the profits, and divers other items, that represented not a dollar used in the construction of the road, may be, at the pleasure of the company, capitalized, counted, and refunded, as a part of the "full sum invested" within the meaning of section twenty-three, is equivalent to holding that it was the legislative intent to place it wholly within the power of the corporation to defeat the State's right by avoiding the accumulation of a surplus.

The facts of this case illustrate the absurdities to which such a construction of the statute will lead. As we have heretofore seen, the company used in the construction of the road, ready for business, subscriptions to its capital stock and the proceeds of negotiated bonds afterwards converted into stock by the holders, the sum of \$1,216,690, which sum was the investment meant by section twenty-three as entitled to reimbursement, and upon which a fifteen per cent. dividend should thereafter be paid. The road was opened for business in the autumn of 1851. The company commenced declaring and paying dividends in 1852, and, in the words of appellant's counsel, "continued from that time until this investigation closed, in 1873, to pay semi-annual dividends every year of its existence in large amounts,—ten per cent. additional, and extra ten per cent. additional, and extra seven and eight per cent." For obvious reasons, arising while the road was pursuing its extraordinary career, the capital stock was increased by dividing among the shareholders as stock dividends, in 1856, \$211,600; in 1864, \$376,700, and by issues on divers other accounts, heretofore set forth in a table, amounting in all to \$771,460, predicated upon a disbursement of profits and replacements, betterments, and extensions, five and thir-

teen years, respectively, after the road began business, thus making the total issue of stock \$1,988,150, and which is now claimed by appellant to be the "full sum invested," and which must be returned, and receive a fifteen per cent. dividend, before the State becomes entitled to anything. If this claim is to be allowed, the stockholders' investment may be enlarged, by a like process, as often and whenever the exigency of absorbing increased profits arise, and thus effectually prevent a recovery by the State.

It is clear that the legislature never intended that the corporation should have its own way with respect to what should constitute "the full sum invested," what proper operating expenses, and other fit matters of accounting; for the right to require an accounting, which implies the right to have it made on a fair and just basis, is expressly reserved. And while these grounds of settlement remained unadjusted and in controversy, and the initiative rested upon the State, and the question of whether the company owed the school fund remained problematical, and depended solely upon the rules that should prevail in the settlement, no duty rested upon the corporation to pay any sum to the Treasurer of State, and no right of action rested in the State for the recovery of money, with or without a demand. The duty to account when required, as imposed by section twenty-three, means nothing more nor less than the duty to settle, and pay over to the Treasurer of State, any surplus disclosed, when requested or demanded by the legislature to do so.

It is probable that the right of the Attorney-General or the Treasurer of State to demand an accounting would have been implied if the law had been silent. But there is no basis for an inference here. A specific provision for an accounting, and to whom it shall be made, having been written in the law, no other can be implied. A public officer is a creature of the statute, and has no power but that expressly conferred, and necessarily implied, to enable him

to carry out some specific duty, and if at any time down to 1847 the Attorney-General, Treasurer, or other officer of State, had attempted to settle, and give a quittance to appellant, the act would have been void, and would have concluded no one. *McCaslin v. State, ex rel.*, 99 Ind. 428, 439; *Platter v. Board, etc.*, 103 Ind. 360-378; *State v. Portsmouth Sav. Bank*, 106 Ind. 435-451.

We therefore conclude that no suit for money would properly lie against appellant without an accounting and disclosure of something due; that no duty was imposed upon appellant to make an accounting until requested by the General Assembly. This request was not made until 1897, and no actionable default by appellant had occurred prior to that date.

(a) The former complaint was insufficient for another reason. Said complaint was in three paragraphs. The third, being for the recovery of money wrongfully paid the company by the State for the transportation of troops and munitions of war, in violation of its charter (§30), need not be noticed. In the first paragraph it is alleged that the company's charter was passed January 26, 1847; that the company accepted and organized under the charter, but it is not averred when. The total amount invested by the company "was and is" \$1,300,000, but it is not stated when the investment became that sum. The company accepted the general railroad law January 17, 1873. The total amount of net earnings of the road from the beginning had been \$8,000,000, but it is not shown, outside of an exhibit filed with the complaint, how much of the earnings was received before January 17, 1873. The exhibit purports to show only the gross net yearly earnings. To have recourse to it, in support of the complaint, we must find that the exhibit is the foundation of the action; and surely we can not do this. Standing alone the exhibit does not even tend to show a right of action in the plaintiff. The action was not upon an account, nor to recover net earnings,

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but clearly its foundation was the agreements and covenants found in the charter. *State, ex rel., v. Helms*, 136 Ind. 122; *Fuller v. Cox*, 135 Ind. 46; *Price v. Bayless*, 131 Ind. 437.

These indefinite averments tested by the rule that they must be construed most strongly against the pleader, and we have a case showing that sometime between 1847 and the filing of the complaint, May, 1875, the capital invested amounted to..... \$1,300,000

As we are not informed when it was, we will assume that it was the midway period between 1847 and 1873, or July 1, 1860. Before the State became entitled, there must be returned, not only the principal sum invested, but ten per cent. per annum thereon for twelve and one-half years, to wit:..... 1,625,000

And also fifteen per cent. per annum for the last half of the period..... 2,437,500

Total \$5,362,500

We are uninformed how much net earnings was received before the company gave up its special charter in January, 1873, except as we may infer from the amount of net earnings shown to have been expended as follows:

Invested in various bonds and stocks.....	\$3,000,000
Surplus fund	2,000,000
Bonds converted into stocks.....	50,000
Bonds lost, and stock issued therefor.....	5,000

Total \$5,055,000

Which sum is \$307,500 less than the company was entitled to receive before the State's claim would attach.

The second paragraph, by an application of the same rule of construction, shows equally plain that nothing was then recoverable by the State. It was not shown in this para-

graph that the company had ever accepted the general law, and hence we must assume that it was still operating under its original charter. Like the first, it alleges that the charter was granted in 1847, and was accepted; but, no time being stated, we will assume that its acceptance was also in 1847. It is alleged that the full sum invested in construction and equipment was \$1,344,000, and beyond an averment that it amounted to that sum in 1867, and has since then continued that sum, the paragraph is silent as to when that sum was reached; and we are again at liberty to assume that it was all furnished in 1847, when the charter was accepted. Still further like the first, there is no averment of how much had been the net earnings of the company, except so far as it may be presumed from the allegation that the company had, of the net earnings appropriated and invested in bonds and in its own and other railroad stocks, and retained, over necessary contingent expenses, the total sum, of various items set forth, \$5,855,702.

Being without information from the complaint as to when the net earnings were sufficient to pay the full sum invested, and ten per cent. per annum thereon, we are again free to assume that the road began earning money in 1848, and that its aggregate net earnings had reached a sum equal to the capital invested, and ten per cent. thereon, by the middle period between 1848 and 1875,—when the complaint was filed,—thirteen and one-half years, and then the account stands thus:

Capital invested	\$1,344,000
Ten per cent. on the capital for thirteen and one-half years	1,814,400
Fifteen per cent. dividends on the capital for the last thirteen and one-half years.....	2,721,600

Total amount to which the company was entitled before the State's claim attached... \$5,880,000

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Which shows that when the former suit was commenced the company lacked \$24,298 of receiving the amount of profits it was authorized to retain.

Thus we have seen that the complaint of the Attorney-General filed in the Marion Superior Court in May, 1875, failed to exhibit a cause of action, for two reasons. Appellant's demurrer to the complaint in said former suit, for insufficient facts, was sustained, and judgment was rendered on the complaint against the State.

(b) Upon this state of facts the further contention arises, was the judgment thus rendered upon a bad complaint, conclusive, or susceptible of being made conclusive by extrinsic evidence? It is the law everywhere that whenever a matter is adjudicated and finally determined by a competent tribunal it is considered as forever at rest. It may also be said to be a well established rule that a judgment for the defendant, on demurrer to the complaint, by reason of the omission of an essential allegation therein will not bar a subsequent suit upon a complaint in which the omitted allegation is supplied. *Stevens v. Dunbar*, 1 Blackf. 56; *Estep v. Larsh*, 21 Ind. 190; *Griffin v. Wallace*, 66 Ind. 410-417; *Gould v. Evansville, etc., R. Co.*, 91 U. S. 526, 23 L. Ed. 416; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Terry v. Hammonds*, 47 Cal. 32; *Tracy v. Merrill*, 103 Mass. 280; *Gerrish v. Pratt*, 6 Minn. 53; *Carmony v. Hooper*, 5 Pa. St. 305; *Rodman v. Mich. Cent. R. Co.*, 59 Mich. 395, 26 N. W. 651; *Birch v. Funk*, 2 Met. (Ky.) 544; *Florida, etc., R. Co. v. Brown*, 23 Fla. 104, 120, 1 South. 512; *Moore v. Dunn*, 41 Ohio St. 62; *Keater v. Hock*, 16 Iowa 23; *Wells v. Moore*, 49 Mo. 229.

Upon the same principle a judgment against a plaintiff because his action is prematurely brought is no bar to a suit subsequently brought after the cause of action has properly accrued. *Griffin v. Wallace, supra*; *Roberts v. Norris*, 67 Ind. 386, 392; *Indianapolis, etc., R. Co. v. Clark*, 21 Ind. 150; *Chicago, etc., R. Co. v. State, ex rel.*,

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153 Ind. 134; *Brackett v. People, ex rel.*, 115 Ill. 29, 3 N. E. 723; *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22; *Wood v. Faut*, 55 Mich. 185, 20 N. W. 897.

(c) It is, however, very earnestly contended by counsel for appellant that if the superior court gave judgment upon the merits of the case, even if the complaint was deficient, the law and the facts entering into such judgment, can not be further called in question, and that since the record is silent as to the grounds of the judgment, the court below erred in refusing to admit in evidence the written opinion of the judges who sat in the case, to show that the judgment was, in fact, upon the merits, and not upon the form of the complaint. We concede that a judgment for the defendant on demurrer to a complaint that has been well brought, whether it involves pure questions of law, or both law and fact, the general effect is to conclude the parties thereby. And when such a judgment may rest upon more than one theory, or upon more than one class of facts, extraneous evidence—even of what the judge said in pronouncing the same—may be properly allowed, to show to what extent and upon what particular subjects the adjudication should operate. But it is illogical to say that there may be an adjudication of the merits upon a complaint that fails, for want of form or substance, to state any merits, for there can be no merits where there exists no cause of action.

As said in *Moore v. Dunn, supra*, at page 64, "A judgment for a defendant on demurrer to a petition which does not state a cause of action determines nothing, only that the facts alleged were not sufficient to constitute a cause of action. The determination, therefore, did not reach the merits of the case, and did not conclude the plaintiff in a future action in which sufficient facts were alleged." "Such a judgment," says the learned judge in summing up in *Rodman v. Michigan Cent. R. Co.*, 59 Mich. 395, 26 N. W. 651, "is not a bar to a second suit founded upon the same transaction, if the new declaration states a cause of action.

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The merits of plaintiff's case can not be said to have been adjudicated when his declaration fails to state a case, or any merits." The doctrine of these cases is especially applicable to suits brought before the right of action has matured. It is too much to say there can be an adjudication of a claim before it has accrued, or become actionable, and while there remains something to be done by the plaintiff to consummate his right to sue; and as a general rule, supported by sound reason, and as in harmony with the great mass of decided cases relating to the conclusiveness of judgments, it may be affirmed that where an action is prematurely brought, because the plaintiff has not done all incumbent upon him to do to put himself in a position legally to call upon the defendant to perform his contract, a judgment against the plaintiff in such action will not bar a subsequent action after full performance by the plaintiff, and the same duly alleged.

That is this case. When the Attorney-General commenced the suit in 1875, the State had no right of action against appellant, and whether it ever did have a right to sue depended upon the refusal of appellant to account when requested to do so by the legislature. The judgment of the court in sustaining the demurrer to the complaint in that case was clearly right, and the process of reasoning by which the right result was reached is wholly immaterial. *State, ex rel., v. Hyde*, 129 Ind. 296, 306, 13 L. R. A. 79; *Burke v. Table Mountain, etc., Co.*, 12 Cal. 403, 408. Besides there might have been, in the opinion of the court, more than one reason why the plaintiff should fail, and it was content in the expression of one. There is nothing in the record to indicate that the court adjudged the action as timely brought.

(2) The fact that the action in the Marion Superior Court was the result of an agreement by the State and appellant to submit the question of appellant's liability to that court, makes no difference. The agreement was to submit

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the validity of the State's claim upon the facts as they existed at the time, not as they would be after more profits were received, and after a demand for an accounting had been refused. The evidence rejected was, therefore, not material, and if admitted would not have benefited the appellant. Hence its exclusion was not harmful.

(3) The second paragraph of answer pleads an amendment of appellant's charter in 1851 (Local Laws 1851, p. 80), and appellant's acceptance in 1873 of the general railroad law of 1852, in bar of the State's right to recover. The chief argument being that the effect of the amendatory act of 1851 was to annul the old corporation and create two new ones,—one to build the western, and the other the eastern, part of the road,—without renewal of the obligations imposed by sections twenty-two and twenty-three of the old charter. Appellant's original charter authorized the construction of a railroad from the western line of the State, through Indianapolis to Richmond in Wayne county. The amendments of 1851, relied upon, recites that upon the solicitation of the president and directors of the Terre Haute & Richmond Railroad Company, it is enacted that said railroad be and the same is hereby terminated at Indianapolis, and the said president and directors of said road are hereby released and discharged from the construction of any part of said road east of Indianapolis.

By the same act another corporation was created, styled the Indiana Central Railway Company, with authority for the stockholders to meet and elect directors who shall organize a board, and elect similar officers to the Terre Haute & Indianapolis Railroad Company, and who shall take the same oath, possess the same power, and discharge the same duties with the directors and officers of the Terre Haute & Richmond Railroad Company. And said new company is authorized to construct a railroad, in the general direction of the National road, from Indianapolis to the east line of the State, "and shall possess the same rights, privi-

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leges and immunities, and be subject to the same restrictions and liabilities, as said Terre Haute & Richmond Railroad Company;" and the said act, and all its amendments incorporating the Terre Haute & Richmond Railroad Company, are declared to be also the charter of the Indiana Central Railway Company, as far as applicable.

There is not a suggestion anywhere in the amendatory act, that appellant was to be relieved of any of its duties and obligations, beyond the construction of the eastern portion of the originally proposed railroad; nor is there a suggestion anywhere that the old corporation of 1847 was to be dissolved, and two new ones organized,—one to construct the western, and the other the eastern, portion of the contemplated road. To the contrary, the conferring upon the Indiana Central Railway Company, the same rights, privileges, and immunities, and the same restrictions and liabilities as were then possessed and resting upon the Terre Haute & Richmond Railroad Company, gives rise to the clearest inference that the old company was to continue possessed of all its original charter rights and obligations, the same as if it had not given up the building of a part of the proposed road. The amendment shows upon its face that appellant wished a riddance of building the eastern portion, and made of the General Assembly a request to that effect; and it is a strange law that would turn the solicited favor into a discharge from onerous duty, by implication. The acceptance in 1873 of the general railroad law of 1852 had no effect in relieving appellant from unperformed duties, assumed in its charter contract of 1847. The demurrer to the second paragraph of answer was properly sustained.

(4) It is set up in paragraphs five, six, and seven of the answer that the plaintiff's cause of action accrued more than six, fifteen, and twenty years, respectively, "*prior to the commencement of this suit;*" and in paragraph eight, that, so far as the complaint sought to recover money

claimed to be due prior to 1866, the cause of action accrued more than fifteen years before the 19th day of September, 1881. Paragraph nine averred that as to all claim for money due before September 19, 1861, the cause of action had accrued more than twenty years before September 19, 1881; and paragraph ten that the cause of action accrued more than six years before September 19, 1881. The demurrer was sustained to the fifth, sixth, seventh, eighth, and tenth answers, and overruled as to the ninth.

By the statutes of 1852 (2 R. S. 1852, p. 78, §224), it was provided that "Limitation of actions shall bar the State of Indiana * * * as other persons." This section was in force till the taking effect of the revision of 1881, on the 19th day of September, 1881, which provided (§304 R. S. 1881), that "Limitations of actions shall not bar the State of Indiana except as to sureties." The chief debate upon these answers is as to whether appellant's charter shall be held to be a contract in writing, or as resting in parol. If a contract in writing, an action upon it will be barred which had been running twenty years (2 R. S. 1852, p. 76, §211, clause 5), next before September 19, 1881 (§304 *supra*,) and if not in writing, after the lapse of six years next before September 19, 1881. It is sufficient to say that the fifth, sixth, and seventh paragraphs are all bad for pleading the statute as operating to the time of the commencement of this suit, April 22, 1897, sixteen years after the statute had ceased to run against the State. The fifteen years statute pleaded in the eighth was inapplicable. The ninth paragraph was held good, and the real question arises upon the tenth.

We are unable to concede the contention that appellant's charter is a contract "not in writing," and that there is nothing more in the case than a simple claim for money. It is not essential to a contract in writing that it be signed by both parties. The signature of one, with acceptance by the other of the benefits stipulated, constitutes a written contract. *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A.

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604, 21 Am. St. 189; *Harlan v. Logansport, etc., Co.*, 133 Ind. 323; *Indianapolis Gas Co. v. Kibbey*, 135 Ind. 357; *Thiebaud v. Union Furniture Co.*, 143 Ind. 340; *Leach v. Rains*, 149 Ind. 152.

By the act of 1847 certain named persons were constituted the appellant corporation. The terms and conditions upon which the gentlemen named, and their successors, might exercise corporate rights and privileges are specifically set forth, and the rights and liabilities of both the corporation and the State are definitely fixed. The act was duly executed by the grantor of the benefits, by being passed by the General Assembly, and signed by the proper officers of State. Nothing in connection with its terms and conditions rests in parol. The parties, as well as all the terms and stipulations, can be gathered from the instrument itself. Parol evidence is not competent to explain or vary its provisions. It is absolutely its own proof of all it confers and requires, in a stricter sense than is applicable to other written instruments. We find no element of parol contract about it.

(a) There is no force in the argument that to constitute the charter a written contract, binding on both parties, its acceptance must also appear in writing. The public and notorious exercise of the powers and rights conferred is proof enough of acceptance. See authorities last above cited. The act itself declares that it shall be deemed and taken as a public act. §37. Appellant was named in the act as the only party entitled to its benefits, and, under its terms, appellant elected officers, exercised the right of eminent domain, took possession of real estate, constructed a railroad from the west line of the State to Indianapolis, became a busy common carrier of freights and passengers, fixed its own tolls, appropriated its revenues, and six times within the first four years of its existence went into the legislature and procured in its own corporate name, by amendments, extensions and modifications of its charter

rights and duties; and it is shown by the act of 1865 (Acts 1865, p. 89),—a public law, of which we must all take notice,—passed fifteen years after some person or corporation had accepted the charter of 1847, and had constructed the railroad authorized thereby from Terre Haute to Indianapolis, that appellant again appeared before the General Assembly and procured legislation, which provided that the name and style of the company, incorporated and known as the President and Directors of the Terre Haute & Richmond Railroad Company under an act of January 26, 1847, be changed, and that said company shall hereafter be known by the name and style of the Terre Haute & Indianapolis Railroad Company. And further: "As said company completed so much of said railroad as lies between Terre Haute and Indianapolis within the time authorized by the act incorporating said company, * * * and as said company have not completed so much of said line as lies between Terre Haute and a point on the western line of the State of Indiana, within the time prescribed, the said company under the name and style of the Terre Haute & Indianapolis Railroad Company, shall have seven years further time to complete their railroad to a point on the western line of the State of Indiana from Terre Haute." Under these facts the court could not, if it would, close its eyes to the identity of the party that exercised the rights and enjoyed the benefits stipulated in the act of 1847. We therefore hold that said charter act is a written contract between the State and appellant, and the tenth answer insufficient. *Western, etc., Co. v. Citizens St. R. Co.*, 128 Ind. 525, 10 L. R. A. 770, 25 Am. St. 462.

This case is not of the class to which *Board, etc., v. Shipley*, 77 Ind. 553, and *Board, etc., v. Crockett*, 111 Ind. 316, relied upon by appellant, belong, and hence the latter cases can not be accepted as authority. Each of these cases is grounded on a general order of the board of commissioners for the payment of bounties to induce enlistment into the

army. In the Shipley case the order directed the auditor to draw his warrant in favor of each volunteer, enlisted, sworn, and mustered into the United States service, and credited to the county. More than six years thereafter Shipley brought an action against the county to collect the sum offered, alleging that he had enlisted and was mustered into the United States service, and credited to the county. The order in these cases amounted to nothing more than an offer. Until the offer was accepted by some one it was not a contract; and whether there was an acceptance, an enlistment, a muster in, a credit to the county, and who the party was, could only be established by extrinsic evidence. It was held in these cases that a contract brought about in this way rested partly in writing and partly in parol, and must be regarded as a contract not in writing. The distinction between these and the case at bar is obvious.

(5) The fourth answer, in general terms, and the eleventh, specially, pleads knowledge, acquiescence, and laches on the part of the State in bar of the action. The argument in support of these answers is that the contract by which the State had a right to participate in the profits of appellant was an ordinary business contract, outside the domain of sovereignty and in making the contract the State submitted itself to the same laws that govern individuals. We are unable to accept this argument. A sovereign, as such, has a right to name the conditions upon which it will grant another the right to exercise a public power; and to require the payment of money, in a contingency that may arise, as a means of preserving equality among those exercising like franchises, and to prevent excessive profits, is not an abdication of sovereignty, or an entrance into the domain of commerce within the meaning of the cases cited by appellant.

Appellant is a *quasi* public corporation. Its charter was a matter of public record, equally open to all. The nature

and basis of the State's claim was accessible to all dealers in its stocks and bonds. The action in *quo warranto* in Owen county in 1874, and the suit in the Marion Superior Court in 1875, were public proceedings, and the legal effect of the orders and judgments was equally known to all. That there has been much procrastination is beyond dispute, but a wise public policy has long since forged the rule, now everywhere adhered to, that the state shall not be made to suffer from the delays or negligence of its public officers. *United States v. Kirkpatrick*, 22 U. S. 720, 735, 6 L. Ed. 199; *Crane v. Reeder*, 25 Mich. 303, 320; *Farish v. Coon*, 40 Cal. 33, 50; *State v. Bevers*, 86 N. C. 588, 592; *Wallace v. Maxwell*, 10 Ired. (N. C.) 110, 112, 51 Am. Dec. 380; *Gibbons v. United States*, 8 Wall. 269, 19 L. Ed. 453; *People v. Brown*, 67 Ill. 435.

"It is a familiar doctrine," says the court in the last cited case, "that the state is not embraced within the statute of limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine [estoppel] be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues, and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. * * * The doctrine is well settled that no laches can be imputed to the government, and by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even wilfulness of any one of its officials."

(6) Appellant has assigned errors calling in question the action of the court in overruling certain of its exceptions, and in sustaining certain of appellee's exceptions, to the master's report. The exceptions relate to specific facts and conclusions stated in the master's report. There was no request by either party for a special finding, and the ques-

tion arises, whether the action of the trial court upon the several exceptions to, and items of, the master's report, and its conclusions of law stated thereon, is anything more or less than a special finding under the statute, made without request so to do.

It has become well settled in this State, since the code of 1852, that a written finding of specific facts and conclusions of law thereon, made by the court without a request from either party, amounts to nothing more than a general finding, and an appellate tribunal has no right to regard such unauthorized findings for any purpose other than as a general finding. *Sheets v. Bray*, 125 Ind. 33; *Jacobs v. State*, 127 Ind. 77; *Nelson v. Cottingham*, 152 Ind. 135.

As before stated, there appears in this record what purports to be the trial court's finding and conclusions of law on divers exceptions filed by both the plaintiff and the defendant to the master's report, without a request by either party for such finding.

This action was brought for an accounting, and is therefore a suit in equity (*Field v. Brown*, 146 Ind. 293), and it becomes necessary for us to inquire whether the above rule applies to trials in suits in equity of this class, as well as to trials in actions at law. The evident purpose of our practice code was to sweep away the useless forms and fictions of the old practice in courts of equity, as well as in courts of law, and to abridge, simplify, and cheapen remedial procedure in both jurisdictions. That both courts are subject to the same general rules, is declared in the first line of the code, to wit: "There shall be no distinction in *pleading* and *practice* between actions at law and suits in equity." §249 Burns 1901. Further along in the scheme of reform it is provided (§412 Burns 1901) that "issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court; * * * Provided, that in

all cases triable by the court as above directed, the court, in its discretion, for its information, may cause any question of fact to be tried by a jury, or the court may refer any such cause to a master commissioner, for *hearing and report*." Attention is called to five things in this latter statute: (1) The subject is equity causes; (2) the trier is termed "the court;" (3) issues of law and issues of fact in such cases shall be tried by the court; but (4) the court may, for its information, cause questions of fact to be tried by the jury; or (5) it may refer any such cause to a master for *hearing and report*, not for final determination.

Further upon the subject of trials it is provided (§560 Burns 1901) that "Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally for the plaintiff or defendant, unless one of the parties request it, * * * in which case the court shall first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly."

Under this legislation, it is the court whose judgment is invoked that must finally decide. It may refer questions of fact to the jury, or the cause to a master, but it can not abdicate its power, nor confer upon another the absolute performance of any of its judicial functions. The master commissioner to whom a reference may be made is but an assistant of the court. He may be authorized to collect and analyze the evidence, state accounts, and other facts supposed to be proved, and may even express opinions on the law of the case, and do any other thing that goes to enlighten the court, or relieve it of the minor details of a suit, that does not supplant it in any of its rightful powers. This, however, is the limit of his authority.

In this case the master was commissioned to, and did, report to the court the evidence, the facts supposed to be

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proved thereby, and the law that was supposed to govern such facts. This was all it was possible for him to do. The statute governing the reference conferred upon him power, not to hear and determine, but to hear and report his conclusions to the court, who by the same statute is required to try all issues of law and issues of fact involved in the case. It necessarily follows that the master's report, in all its features, is advisory only. *Lewis v. Godman*, 129 Ind. 359; *Bremmerman v. Jennings*, 101 Ind. 253; *McKinney v. Pierce*, 5 Ind. 422.

The trial is before the court from beginning to end. The agency of the master commissioner is but a means of bringing the evidence before the court, as in some other cases it is brought by depositions, and in others by the witnesses themselves, and as an aid to the court in the performance of its duties. The master's conclusions of law and of fact are recommendations only that the court will consider in the light of the accompanying evidence and adopt as its own such as it approves, and reject such as it disapproves; and when the report has been fully considered, and the exceptions thereto fully disposed of, and noted in writing, as in this case, there is no substantial difference in a record of facts and conclusions of law thus made, and in a special finding and conclusions of law made by the judge in the trial of an action at law where there is no request for a special finding under the statute. The record in both cases exhibits facts and conclusions of law that ultimately become those of the trial judge, and they must be held to be the same in legal effect. The signed writing or record of a trial judge, containing the approved and disapproved items of a master's report, and the conclusions of law stated in ruling upon exceptions thereto, is in every just sense a special finding, and, when made without a request from one party or the other, is a general finding only; and as specific findings and rulings can form no basis for appealable error.

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It follows, therefore, that all errors assigned which challenge the action of the court in sustaining or overruling exceptions to the master's report present no question for our determination; neither do said alleged errors, for the reasons given, furnish any ground for a new trial.

(7) Some additional questions are argued under the motion for a new trial.

During the Civil War period the company paid to the national government revenue taxes amounting in the aggregate to \$117,137, and counsel, in their briefs, have done "royal battle" over the question whether such taxes were paid as an excise on the earnings, and so a charge against the corporation, or as a tax on the dividends declared, and so a charge against the stockholders; the point being that, if the former position is true, the payments must be treated, in this accounting, as operating expenses, and if the latter is correct, they must be treated as dividends, and considered in estimating the return of the capital invested. The question, however, becomes unimportant in the view we have taken of the case.

As the finding of the court is general we are without information, or means of information, as to the details by which the court reached its final conclusion; and our only province, therefore, is to determine whether, from all the evidence, enough items sued for are sustained to equal the amount of the plaintiff's recovery; and if this is found in the affirmative, it can make no difference to the defendant through what process of reasoning the trial court reached the results obtained. *Sheets v. Bray*, 125 Ind. 33; *Jacobs v. State*, 127 Ind. 77; *Stone v. United States*, 164 U. S. 380, 383, 17 Sup. Ct. 71, 41 L. Ed. 477; *British Queen Mining Co. v. Baker, etc., Co.*, 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147.

It will be recalled that the original franchise authorized the construction of a railroad from the western line of the

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State, through Terre Haute and Indianapolis, to Richmond, the construction to be completed within fifteen years from the granting of the charter (1847); that the charter stipulated that the company should have the right to construct the road in such divisions or parts as its interests required, and, upon the completion of any part, the rights and obligations imposed by the charter should apply to any completed part in the same way and to the same extent as to the completed whole; that under this authority the road was completed and opened for business between Terre Haute and Indianapolis in 1851, was a money-maker from the beginning.

The undisputed evidence shows that in every year after 1852 to 1873 the corporation had a surplus of earnings after the payment of expenses and dividends, and such surplus in 1869 amounted to \$1,049,365. From 1869 to 1871, both inclusive, the company expended for branches, sidings, equipment, and an extension from Terre Haute to the Illinois state line, the sum of \$863,855, \$448,959 of which was absorbed in the construction of the Illinois extension. The surplus referred to was at the time chiefly invested in profit-bearing bonds and stocks, and the company, doubtless deeming it more profitable to keep its securities, borrowed \$800,000 by the issue of bonds secured by mortgage on its property, and perhaps used part, if not all the money, in the execution of said several works.

Whatever may be said of the other expenditures of that period, it seems very clear, for reasons given in a former part of this opinion, that the amount used in the extension to the Illinois state line cannot be treated as an operating expense, or as a part of the capital invested within the sense of section twenty-three of the charter.

The time limit for the building of the road expired in 1862, and the railroad had then been completed and in suc-

cessful operation between Terre Haute and Indianapolis for eleven years, and the construction account of the road had been formally closed on the books of the corporation (1856) for five years, without any step having been taken looking to the construction from Terre Haute to the Illinois state line, beyond procuring the right to do so in its original charter. Three years after the forfeiture of its right to build to the Illinois line (1865), the company, under the name of the Terre Haute & Indianapolis Railroad Company, by a so-called amendment to its charter, procured from the legislature authority to make said extension.

The latter action of the legislature was neither an amendment nor an extension of a former right, for there was then nothing to amend or extend, but the authority given was the creation of a new right in every sense the same as if no such right had once existed under the old charter. The extension was not necessary to the successful conduct of the company's business. It was not a renewal, nor a needed improvement. It was simply an addition to the company's property. The right of the corporation to invest its surplus in proper channels will not be denied, but to employ its accumulated net earnings in the expansion of its property and assets, to the exclusion of the State, can not be conceded. Under the charter it was the duty of the directors to divide surplus profits, as they arose, among the stockholders, as dividends; and if the duty had been performed the day of reckoning with the State would have been hastened by several years, and it would be grossly inequitable to permit them to eliminate the rights of the State by withholding and diverting such profits into other forms.

From the evidence, therefore, which is almost wholly undisputed, the accounting comes to this:

Total dividends declared to December 31, 1871.....	\$3,601,212
Deduct total government taxes....	117,137
	<hr/>
	\$3,484,075
Total capital invested.....	\$1,216,690
Add ten per cent. per annum from several dates of investment to December 31, 1871.....	2,074,281
	<hr/>
	\$3,290,971
Excess of dividends over capital and ten per cent.....	\$193,104
Add net earnings for 1870 and 1871, less amount of dividends declared for same years.....	138,552
Add total net earnings for 1872..	296,589
Add unexpended surplus of December, 1869, being \$1,049,365, less \$863,855 expended in 1869, 1870 and 1871.....	185,510
Plus amount expended in extension to Illinois.....	448,959
	<hr/>
	\$1,262,714
Deduct fifteen per cent. on capital invested (\$1,216,690) from December 31, 1871, to January 17, 1873	182,503
	<hr/>
	\$1,080,211
Even deducting for contingent expenses of 1873, as claimed.....	100,000
	<hr/>
And the balance apparently due the State is.....	\$980,211
To which might be added interest from date of demand.	

It will thus be seen that excluding the government taxes the finding and judgment against appellant might have been for a much larger sum, and was clearly within the evidence.

What has been said in former pages disposes of the seventh, eighth, and ninth causes for a new trial.

(8) The court did not err by referring the cause to a master. *Field v. Brown*, 146 Ind. 293.

The cross-errors assigned, and not waived, call in question the action of the trial court in overruling appellee's motions to modify the judgment. The trial court, as we have seen, made a general finding and rendered judgment thereon for the amount of the finding. There is nothing, therefore, in the record showing that the motions to modify were not properly overruled.

Judgment affirmed.

Jordan, J., concurs in part and dissents in part.

OPINION CONCURRING AND DISSENTING IN PART.

JORDAN, J.—I can not unconditionally vote to affirm the judgment in this case, and may state that it appears to me that the majority of the court has indulged in an unwarranted procedure in holding that the amount awarded to appellee by the judgment below should be affirmed, without regard to the federal taxes, which the trial court, as is disclosed by its ruling on the exceptions, included as a part of the amount of recovery. If the amount of the federal taxes in question be remitted, then the amount of recovery remaining, in my opinion, will represent the extreme limit to which the State was legitimately entitled. This court seems to have reached the conclusion on the question in respect to the amount to be recovered, not by confining itself to a review of the rulings of the trial court on the exceptions filed to the findings and conclusions of the master commissioner on the point relative to what items should be included in constituting or making up the amount of re-

covery, but has wholly disregarded this question or issue as the same was presented and raised by the exceptions filed below, and dismisses the several exceptions, and the rulings thereon, as of no avail in presenting any question for review in this case. Especially is the point or proposition disregarded, and not reviewed, which was determined adversely to appellant below, on the exception to the finding and conclusion of the commissioner in regard to its being entitled to a credit for the amount of the taxes which it paid to the federal government. I concede the right of the trial court to have set aside or rejected, as a whole, the findings and conclusions of the master, and to make its own finding upon the evidence in respect to the amount that ought to be recovered in this action. But this right, however, the trial court did not exercise. It is not disclosed that the court, on the evidence reported by the master, made a general finding without regard to its ruling on the exceptions upon this point, but it is evident that it decided the particular question on the specific exception made to the report of the commissioner. Or in other words, the trial court when it sustained an exception to certain parts of the report of the the commissioner, thereby in effect substituted its conclusion in the place of that stated by the master; and when it denied an exception, by such ruling, it, in effect, asserted that it adhered to and approved the finding or conclusion of the master commissioner. The exceptions and rulings thereon in respect to the recovery, as presented, are to be treated as constituting a special finding and conclusions by the court, and the parties have so considered them by basing assignments of error thereon. *McCutchen v. McCutchen*, 141 Ind. 697. Under the rules pertaining to chancery practice, the findings and conclusions of a master are considered as in the nature of a special finding, and the right of the parties to present questions for review by means of exceptions thereto is recognized. This practice can not be said to be abrogated by the provisions of the civil code

pertaining to special findings. In fact, it may be said that such practice is at least impliedly recognized by the provisions of the code under which circuit and superior courts are empowered to appoint a master commissioner to report the evidence, etc. The opinion of the majority shows that this court rejects the question in regard to the amount to be recovered, as presented and raised by these several exceptions, and has virtually usurped the rights of the lower court, by making its own finding upon the evidence to sustain the amount of the judgment; thereby considering not only the items which the trial court allowed, but also those which it rejected and refused to allow in favor of the State. In other words, the opinion affirms that it is wholly immaterial whether the lower court was right or wrong in declining to credit appellant with the federal taxes in question, for the reason that there are other items which the trial court, as disclosed by its rulings on the exceptions, refused to allow in favor of appellee in assessing the amount of recovery, which, when considered in this appeal, this court holds are more than sufficient to supply the deficiency which would result if the amount paid out by appellant as an excise tax was allowed to its credit.

The conclusion apparently reached is that the action of the trial court in denying appellant the right to a credit for these taxes, even though erroneous, must be deemed and treated as harmless. When the procedure or action of the court in finding, by the method employed, that the amount of recovery should be sustained, is considered, it is evident, in my opinion, that such procedure, under the circumstances, is wholly unwarranted by the rules of law governing the review of the question as herein involved and presented in relation to the proper amount of recovery. The exceptions and rulings thereon by the trial court certainly serve to expose or indicate in this appeal the views of the trial court in its application of the law in regard to what items ought to be, and what ought not to be, taken into

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consideration in assessing the amount which appellee is entitled to recover.

I concur with the majority of the court in its ultimate conclusion so far as it affirms appellee's right to recover in this action, and would vote for an affirmance generally, on the condition that the State be required to remit the amount as measured by the federal taxes paid by appellant. That the latter is entitled to this credit I think is settled by the following decisions of the United States Supreme Court: *Railroad Co. v. Collector*, 100 U. S. 595, 25 L. Ed. 647; *United States v. Erie R. Co.*, 106 U. S. 327, 27 L. Ed. 151; *Memphis, etc., R. Co. v. United States*, 108 U. S. 228, 2 Sup. Ct. 482, 27 L. Ed. 711.

These decisions construe the act of congress under which the taxes were imposed, and by them,—the question arising on the construction of the federal act in controversy,—this court is bound, and it is not within its province to modify or overrule them.

BUTT v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

[No. 19,739. Filed November 25, 1902.]

159 490
161 371

APPEAL.—*Transcript.*—*Incorporation of Bill of Exceptions.*—Where what purports to be a bill of exceptions is attached after the clerk's certificate, but is not identified as a bill of exceptions in the cause, it will not be considered on appeal. *p. 491.*

159 490
171 295

SAME.—*Fatal Defect in Transcript.*—*When Cause Affirmed.*—Where the questions sought to be presented by an appellant depend upon the incorporation in the record of a certain bill of exceptions, and such bill is not properly certified by the clerk, which fact had long since been pointed out by appellee in his brief, but no steps are taken by appellant to amend his transcript, the cause will be affirmed. *pp. 491, 492.*

From Elkhart Circuit Court; *H. D. Wilson*, Judge.

Action by Catherine Butt against the Lake Shore and Michigan Southern Railway Company. From a judgment for defendant, plaintiff appeals. *Affirmed.*

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J. D. Osborne, R. M. Johnson and Robert Lowry, for appellant.

C. W. Miller, J. S. Drake and S. C. Hubbell, for appellee.

GILLET, J.—Upon the conclusion of the evidence in this case, the trial court instructed the jury, to whom the cause was submitted, to find for appellee. The jury so found, and final judgment was rendered that appellant take nothing by her suit. A motion for a new trial was filed by her. This motion was overruled, and the ruling is here assigned as error. Other assignments of error were made, but they have not been discussed. It is contended by appellant's counsel that said motion should have been granted because of the giving of said instruction, and because of the exclusion of a certain item of documentary evidence.

Appellee's counsel insist that the evidence is not in the record, because the document that purports to be the original bill of exceptions is not incorporated into the transcript, but has been attached to the transcript following the certificate of the clerk. The certificate of the clerk states "that the *above* and *foregoing* transcript contains full, true, perfect, and complete copies of all papers, entries, rulings, and proceedings, together with the original bill of exceptions containing the evidence." All further general references in the clerk's certificate to such document must therefore be understood to refer to a bill of exceptions containing the evidence that should, but does not, precede the clerk's certificate. The document attached to the transcript that purports to be the bill of exceptions containing the evidence is, therefore, not certified. Mr. Ewbank, in his Manual of Practice, §116, says: "The bill of exceptions as well as all other parts of the transcript must precede the clerk's certificate and be identified by it." It was held by this court, in *De Hart v. Board, etc.*, 143 Ind. 363, where the bill of exceptions was attached after the clerk's certificate, and not identified as a bill of exceptions in the cause, that it could not be considered. To the same effect, see

Huber Mfg. Co. v. Busey, 16 Ind. App. 410. Upon this state of the record, it is evident that appellant's counsel are not in a situation to urge successfully the points on which they rely for a reversal.

The above objection was made by appellee's counsel in a brief filed March 15, 1902, but no steps have since been taken to amend the transcript. If the transcript were imperfect, we would dismiss the appeal, but here the transcript, in so far as it can be said to be such, is perfect, and the cause coming to us upon regular distribution without the transcript being amended, months after the point has been made, we must affirm the decision below, either upon the above or some other ground.

Notwithstanding the fact that the record is in the condition indicated, we have examined what purports to be the transcript of the evidence, but, after consideration, we have concluded that the above stated reason is at least the safer ground on which to affirm the cause.

Judgment affirmed.

DIXON v. POE.

[No. 19,784. Filed November 25, 1902.]

159	492
162	208
159	492
163	92
159	492
165	196
159	492
167	204
168	674

MASTER AND SERVANT. — Wages. — Assignment. — Payment by Trade Check. — Class Legislation. — Title of Act.—The title of the act of March 11, 1901 (Acts 1901, p. 548), is: "An act concerning the issuance of checks, tickets, tokens, or other devices payable in merchandise, or anything other than lawful money by merchants, in payment for the assignment or transfer of wages of employes in coal mines, and repealing all laws in conflict therewith." The body of the act mentions and includes "any merchant or dealer in goods or merchandise, or any other person," upon the one hand, and "any employe or laborer for wages who labors in and about any coal mine," upon the other. *Held*, that the act must be construed as applying only to merchants and to that class of laborers who work in coal mines, and is therefore unconstitutional as being class legislation.

From Sullivan Circuit Court; *O. B. Harris*, Judge.

Dixon v. Poe.

Action by James H. Poe against Nathan G. Dixon. From a judgment for plaintiff, defendant appeals. *Reversed.*

J. T. Hays and *W. H. Hays*, for appellant.

J. B. Filbert, for appellee.

DOWLING, J.—This action was brought by the appellee against the appellant, under the act of March 11, 1901, (Acts 1901, p. 548, §7448a Burns 1901), to recover from the appellant the amount of wages assigned by one Walsh, an employe in a coal mine in this State, to the appellant, in consideration of the issue to him of four metallic tokens calling for and payable in goods at the store of the appellant in this State. The complaint stated facts sufficient to bring the case within the statute, and a demurrer to it was overruled. An answer was filed by appellant alleging that the wages assigned were already earned at the time of such assignment; that appellant had for years owned and carried on a general retail store in this State; that the four metallic tokens expressed the agreement of the appellant to pay in merchandise at his store, at the usual cash price, the amount stamped on each of them; that Walsh, the miner, knew this, and agreed to accept merchandise in payment of the sum represented by said tokens; that the appellee had notice of these facts when he became the owner of the said tokens; that appellant has at all times been ready and willing to pay said tokens in merchandise, according to his agreement, but that neither Walsh nor the appellant has at any time demanded payment of said tokens in merchandise. A demurrer to the answer having been sustained, the appellant refused to plead further, and, upon proof of his complaint, judgment was rendered in favor of the appellee.

The errors assigned are: (1) That the court erred in overruling the demurrer to the complaint; and (2) in sustaining the demurrer to the answer. The question pre-

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sented is the validity of the act of March 11, 1901, prohibiting the issuing of tokens payable otherwise than in lawful money of the United States, upon an assignment of wages earned or unearned by any employe or laborer in any coal mine in this State, and making any such tokens issued in violation of the act, in the hands of any owner, immediately due and payable in lawful money to the extent of the wages assigned.

The objections taken to the act by the appellant are that it contravenes §1, article 1, of the State Constitution, which declares that life, liberty, and the pursuit of happiness, are unalienable rights; and that it violates §23, article 1, of the Constitution which prohibits the General Assembly from granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not belong equally to all citizens.

We do not deem it necessary to determine the question whether the act before us unduly restricts the right of the citizens of this State to contract, or whether its practical effect may not be to take private property without due process of law. We shall consider the act solely with reference to that clause of the Constitution which interdicts class legislation, or the grant to any citizen, or class of citizens, of special privileges or special immunities.

The body of the act mentions and includes "any merchant or dealer in goods or merchandise, or any other person," upon the one hand, and "any employe or laborer for wages, who labors in and about any coal mine in this State," upon the other. So far, then, as the classification first mentioned is concerned, it is comprehensive enough to include all of the citizens of the State, treating all alike, conferring no special privileges or immunities upon any, and subjecting none to restrictions in trade or business, to deprivation of property rights, or to penalties which are not equally and impartially imposed upon all other citizens similarly situated. But an examination of the *title* of the act discloses

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that its subject, as expressed therein, is not coextensive with the act itself. It is in these words: "An act concerning the issuance of checks, tickets, tokens, or other devices payable in merchandise, or anything other than lawful money by merchants, in payment for the assignment or transfer of wages of employes in coal mines, and repealing all laws in conflict therewith." So that, as the title refers only to *merchants* who issue "checks, tickets, tokens, or other devices," no persons, natural or artificial, can be brought within the scope of the act who do not belong to the particular class designated in the title as *merchants*. Const., Art. 4, §19; *Mewherter v. Price*, 11 Ind. 199; *State v. Bowers*, 14 Ind. 195; *State v. Young*, 47 Ind. 150.

The statute, therefore, must be treated as an enactment operative only upon two classes of persons,—*merchants*, and employes in coal mines. All other persons, copartnerships, and corporations in the State may issue checks, tickets, tokens, or other devices payable in merchandise, or anything other than lawful money, in payment for the transfer of the wages of employes in coal mines; but no *merchant* in this State is permitted to do so. The mechanic, the farmer, the professional man, the banker, or broker may lawfully take an assignment of the wages of the coal miner, and, in consideration of such transfer, may issue to the miner a check, ticket, or token payable only in merchandise, work, produce, professional services, or depreciated notes, or currency. The *merchant* must redeem *his* check, ticket, or token in gold, silver, United States treasury notes, or other lawful money of the United States. By confining the prohibitory terms of the statute to *merchants*, and exempting all other persons, natural and artificial, from their operation; by declaring void the agreement of the *merchant*, but leaving the same kind of contract valid as to the farmer, mechanic, or banker; by permitting one class of citizens to pay their debts in merchandise, but requiring another, under precisely the same circumstances, to pay in lawful

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money only, the act, undeniably, confers valuable privileges on the mechanic, farmer, professional man, banker, and broker, and denies them to the *merchant*. Total immunity from the restrictions, inconveniences, and losses resulting, and intended to result, from the statute is granted to one class and is impliedly withheld from another. Is a distribution of the citizens of the State in an act concerning the transfer of a claim for wages, which puts the *merchants* of the State in one class and all other citizens in another, a reasonable and constitutional arrangement? Could an act of the legislature, which authorized a judgment without stay of execution or exemption upon an account or claim due to any *merchant*, be upheld against the objection that this was a privilege granted to *merchants* as a class, and which could not, upon the same terms, be enjoyed by the other citizens of the State? Or would an act stand which fixed the amount of property to be set off to every *merchant* as exempt from execution at \$1,000, while it limited exemptions to the other citizens to \$600? Such a classification would be regarded by every one as unnatural, and in violation of the provision of the Constitution prohibiting such distinctions.

Again, is the classification of the supposed *beneficiaries* of the act a reasonable and legal one? They are described as "any employe or laborer for wages who labor in and about any coal mine in this State." This classification seems to rest upon no sound or proper basis. Laborers and employes engaged in a particular industry, who are no less intelligent and no less competent to care for their own interests than laborers and employes pursuing other occupations, are, by the statute, singled out and authorized to avoid their express agreements, when, under like circumstances, such other laborers and employes enjoy no such privilege. The law does not embrace all of the class to which it is naturally related. It creates a preference, and establishes an inequality among a class of citizens all of

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whom are equally meritorious. It applies to persons in certain situations, and excludes from its effect other persons who are not dissimilar in these respects. Leaving the miner and the merchant free to deal with all other citizens, the act disqualifies them from contracting with each other. *State, ex rel., v. Parsons*, 40 N. J. L. 1; *Indianapolis St. R. Co. v. Robinson*, 157 Ind. 232; *Brewer v. McClelland*, 144 Ind. 423, 17 L. R. A. 845; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. 863, 6 L. R. A. 621; *State v. Garbroski*, 111 Iowa 496, 82 N. W. 959, 82 Am. St. 524, 56 L. R. A. 570; *State v. Fire Creek, etc., Co.*, 33 W. Va. 188, 10 S. E. 288, 6 L. R. A. 359, 25 Am. St. 891; *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. 357; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Wally's Heirs v. Kennedy*, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511; *Bank, etc., v. Cooper*, 2 Yerg. (Tenn.) 599, 24 Am. Dec. 517.

It is said by Judge Cooley in *Const. Lim.* (5th ed.), 393: "The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to

the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negated."

The statute under review does undertake to provide that persons following the lawful trade of *merchants* shall not have capacity to make certain contracts, or to receive certain transfers of personal property which are entirely permissible to others. It also, and in a manner quite as offensive to the Constitution, confers privileges and immunities upon employes and laborers in coal mines which are not possessed by other citizens of this State employed as laborers in other occupations.

We do not wish to be understood as saying that statutes free from any constitutional infirmity may not be enacted, which apply exclusively to merchants, coal miners, bankers, physicians, dairymen, druggists, or persons engaged in other particular occupations. Such a classification may, in some cases, be a legitimate one. But in every instance of this kind where such statutes have been upheld, the classification has rested upon some quality, condition, or state of things peculiar to the occupation itself, or upon some consideration of public policy which made it proper or necessary to regulate, control, license, tax, or prohibit it. *State, ex rel., v. Green*, 112 Ind. 462; *Wilkins v. State*, 113 Ind. 514; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400; *Blair v. Kilpatrick*, 40 Ind. 312; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313; *Ferner v. State*, 151 Ind. 247; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *State, ex rel., v. Webster*, 150 Ind. 607, 41 L. R. A. 212; *Parks v. State, ante*, 211.

We have found no case sustaining a statute which prohibited an individual engaged in a particular, lawful occu-

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pation, and not under special disability, such as infancy, insanity, or the like, from doing an act, *not necessarily connected with his business*, which every other citizen was by law permitted to do.

The only case referred to by counsel for appellee in support of their contention that the act of 1901 (Acts 1901, p. 548, §7448a Burns 1901) is valid, is *Hancock v. Yaden*, 121 Ind. 366, 16 Am. St. 396, 6 L. R. A. 576. The question there was whether the legislature could prohibit men from contracting in advance to accept payment in something other than the lawful money of the country for the wages they might earn in the future. It was held that the acts prohibiting such contracts were within the scope of legislative power. The acts referred to in that case applied to "any owner, corporation, association, company, firm or person engaged in mining coal, ore or other minerals, or quarrying stone, or in manufacturing iron, steel, lumber, staves, heading, barrels, brick, tile, machinery, agricultural or mechanical implements or any article of merchandise;" and, as its beneficiaries, it embraced "any persons" executing a contract or agreement to waive his or her legal right to demand or receive from such owner, corporation, etc., at least once every two weeks, payment of the amount due to such persons for labor performed, in lawful money of the United States. Acts 1887, p. 13; Acts 1889, p. 191; Elliott's Supp., §§1599, 1610. No question as to an improper classification seems to have been made, and the act applied to all persons and corporations in this State engaged in mining, quarrying, or manufacturing, and to every one in their employment. The point decided in that case was the power of the legislature to restrict the right to contract for a waiver of the benefit of the statute. The question before us under the act of 1901, is the constitutionality of the classification adopted. *Hancock v. Yaden*, *supra*, has no application to this question, and throws no light upon it.

Boomershine v. Uline.

It is with great reluctance that we declare an act of the legislature invalid; but the act of 1901, *supra*, so plainly violates the rule of the Constitution forbidding the grant of special privileges and immunities to a favored class of citizens and subjecting another class to special disabilities and restrictions, that we have no choice but to adjudge it void.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

BOOMERSHINE *v.* ULIN ET AL.

[No. 19,786. Filed November 25, 1902.]

INTOXICATING LIQUORS.—*Remonstrance.*—*Grounds of Need not be Stated.*

—A remonstrance against the granting of a license to sell liquors, under section nine of the act of March 11, 1895 (Acts 1895, p. 251), need not state the grounds on which the remonstrators rely to defeat the application. *p.* 501.

SAME.—*Remonstrance.*—*Constitutionality of Statute.*—*Class Legislation.*—Section nine of the act of March 11, 1895, providing the manner in which the legal voters of a township or city ward may successfully remonstrate against the granting of licenses to sell intoxicating liquors, is not unconstitutional as being class legislation; since all applicants for license are subject to the same condition, and are granted or refused license upon the same terms. *pp.* 502-504.

From Elkhart Circuit Court; *J. S. Drake*, Special Judge.

Application for license to sell liquor by Adam Boomershine. Remonstrance by Barney Uline and others. From a judgment refusing the license, the applicant appeals. *Affirmed.*

E. A. Dausman, L. L. Burris and *W. H. H. Dennis* for appellant.

B. F. Deahl, Anthony Deahl, C. J. Orbison and *E. F. Ritter*, for appellees.

MONKS, J.—This proceeding was brought by appellant under §7278 Burns 1901, §5314 R. S. 1881 and Horner 1901, to obtain a license to sell intoxicating liquors at Nap-

159	500
159	596

159	500
160	877

159	500
162	586

159	500
163	515

159	500
165	191

159	500
168	18
168	639

159	500
169	193

panee, Locke township, Elkhart county, in a less quantity than five gallons at a time. Acts 1897, p. 253, §7283 Burns 1901, §5318 Horner 1901. On appeal, the court below refused the license on the ground that a majority of the legal voters of said Locke township had remonstrated against the granting of such license, under §7283i Burns 1901, §5323i Horner 1901, being section nine of the act known as the Nicholson law.

Appellant first insists that a remonstrance under section nine of the Nicholson law "must state the grounds on which the remonstrators rely to defeat the application for a license," the same as is required by section three of the act of 1875, §7278 Burns 1901, §5314 R. S. 1881 and Horner 1901, and that the remonstrance in this case was, therefore, insufficient because no such grounds were stated. Said section nine does not require that any grounds or reasons for not granting the license be stated in a remonstrance filed under said section; and remonstrances under said section which gave no grounds or reasons therefor, except that the remonstrators were opposed to the granting of a license to the applicant, have been uniformly held sufficient by this court. *Cochell v. Reynolds*, 156 Ind. 14; *Wilcox v. Bryant*, 156 Ind. 379; *Flynn v. Taylor*, 145 Ind. 533; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313; *Sutherland v. McKinney*, 146 Ind. 611.

In *Cochell v. Reynolds*, *supra*, at page 16, this court said: "Under section nine of the supplemental law of 1895, a remonstrance states facts sufficient to constitute a defense if it alleges the opposition of the remonstrators to the granting of the license. Simply that they are averse to the applicant's conducting a saloon in their township or ward is enough. That the required number, with proper qualifications, are remonstrants, is to be determined by proof."

It is true that a majority of the voters of a township or ward have the power, by remonstrating against granting a license to an applicant, to prevent the board of commission-

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ers or court on appeal from exercising jurisdiction to grant a license; but, so construed, the law has been held constitutional by this court. *State v. Gerhardt, supra; Flynn v. Taylor, supra; Wilcox v. Bryant, supra.*

There is no substantial difference between said section nine and the laws which require that, before a license to sell intoxicating liquors will be granted, the applicant must procure the consent or recommendation of a majority of the legal voters of the township or ward in which the saloon is to be located, or a designated number of voters, property owners, citizens, or taxpayers thereof. Such laws have been uniformly held constitutional in this and other states. *Groesch v. State*, 42 Ind. 547; *Ex parte Christensen*, 85 Cal. 208, 24 Pac. 748; *Ex parte Holmquist* (Cal.), 27 Pac. 1099; *State, ex rel., v. Brown*, 19 Fla. 563; *State, ex rel., v. County Com., etc.*, 22 Fla. 364; *Swift v. People, ex rel.*, 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470; *City of Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. 325; *Whitten v. Covington*, 43 Ga. 421; *Rohrbacher v. Jackson*, 51 Miss. 735; *Van Nortwick v. Bennett*, 62 N. J. L. 151, 40 Atl. 689; *Jones v. Hilliard*, 69 Ala. 300; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620; *In re Hoover*, 30 Fed. 51; *Black, Intox. Liq.*, §§45, 47; 17 Am. & Eng. Ency. Law (2d ed.), 211, 212, 247, 248, 249.

It was held by this court in *State v. Gerhardt*, 145 Ind. 439, 468, 473, 33 L. R. A. 313, *Massey v. Dunlap*, 146 Ind. 350, and *Cochell v. Reynolds*, 156 Ind. 14, 17, "that by section nine of the act of 1895, there was created a 'species of self-government which by the law is placed in the hands of the people to be exercised by a majority of them according as they may judge to be for their best interest.'" See *Groesch v. State, supra*. In *Cochell v. Reynolds, supra*, at page 17, the court said: "The regulation and restraint of the sale of intoxicating liquors is an exercise of the police power of the State. That power, as

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an original, primary power, is lodged in the legislature. The legislature has delegated a portion of the power to the voters of the townships and city wards. To each voter is committed the right to decide whether or not he will oppose any or all applications. He may be hostile to the commerce and determine that he will resist every application. He may favor a well regulated traffic and conclude to thwart only those applicants he deems unfit."

In *State v. Gerhardt, supra*, at page 462, this court said: "The principle upon which is based the regulation of the liquor traffic is found in the police power of the State, and it should be remembered, in construing all statutes on that subject, that no one possesses an inalienable or constitutional right to keep a saloon for the sale of intoxicating liquors. *Sherlock v. Stuart*, 96 Mich. 193 [21 L. R. A. 580]. 'To sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling.' Black, Intox. Liq. §48."

In *Crowley v. Christensen, supra*, the Supreme Court of the United States, by Mr. Justice Field, said: "There is no inherent right in a citizen to thus sell intoxicating liquor by retail; it is not a privilege of a citizen of the state or of the United States. As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only."

Appellant insists, however, that said section nine, so construed, violates §23, article 1, of the Constitution of this State, which provides that "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms, shall not equally

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belong to all citizens." This is not tenable, even if said section is applicable here,—a question we need not and do not decide; but see *Blair v. Kilpatrick*, 40 Ind. 312, 315, *Blair v. Rutenfranz*, 40 Ind. 318, *Welsh v. State*, 126 Ind. 71, 76, 77, 78, 9 L. R. A. 664, *Woodford v. Hamilton*, 139 Ind. 481, 485, for the reason that all applicants for a license are subject to the same conditions, and are granted or refused licenses upon the same terms.

The names of voters of Locke township appearing on the remonstrance against appellant were not signed by them, but by a person acting under the authority of a written instrument executed by said voters. Appellant insists that the remonstrance was void because not signed by the voters in person. Since appellant filed his brief, this court, in *Ludwig v. Cory*, 158 Ind. 582, where the "power of attorney" was substantially the same as the one in this case, held that the remonstrance to which the names of a majority of the voters were signed by another, by virtue of such an instrument, was valid, the same as if signed by the voters themselves.

Finding no error in the record the judgment is affirmed.

THE STATE v. CARY.

[No. 19,791. Filed November 25, 1902.]

PERJURY.—*In Answer to Impeaching Question.*—Where a defendant on trial for a crime testified falsely in answer to an impeaching question, he was guilty of perjury, even though the question as asked was one which, under the law, he could not have been compelled to answer. pp. 506, 507.

SAME.—*Information.*—*Acquittal.*—An information charging defendant with perjury while testifying as a witness in his own behalf on trial for a crime will not be quashed on the ground that defendant's acquittal at such trial showed that the testimony he gave was true. pp. 507, 508.

From Huntington Circuit Court; *J. C. Branyan*, Judge.

William Cary was prosecuted for perjury. From a judgment sustaining a motion to quash the affidavit and information, the State appeals. *Reversed.*

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W. L. Taylor, Attorney-General, Merrill Moores, C. C. Hadley, C. W. Watkins, H. C. Morgan and W. A. Mitchell, for State.

J. B. Kenner, U. S. Lesh and Eben Lesh, for appellee.

JORDAN, J.—Appellee was prosecuted by affidavit and information on the charge of having committed the crime of perjury. On his motion the court quashed the first, second, and fourth counts of the information, and the first, second, and fourth paragraphs of the affidavit upon which the information was based. The third count of the information was dismissed by the State, and the defendant was therefore discharged by the court from further prosecution under the affidavit and information. The State reserved exceptions to these rulings of the court, and assigns errors thereon in this appeal. The substance of the charge, as embraced in the affidavit and information, is to the effect that appellee at a former term of the Huntington Circuit Court had been tried on a charge of having committed an assault and battery with the intent to commit a rape on the person of one Fannie Cupples. On the trial of said cause it appears that said accused after taking the oath required by law became a witness before the court and jury in his own behalf, and it then and there became and was material to the point in question whether he had committed an assault and battery on said Fannie Cupples. It is shown that appellee when testifying in his own behalf made statements whereby he denied that he had committed the assault and battery in controversy upon said Cupples, and for the purpose of contradicting or impeaching him as a witness in this respect it became and was material to inquire of him as such witness, on cross-examination, in regard to certain admissions or declarations made by him to one Tumbleson relative to a certain rude touching or handling by him (appellee) of the person of said Fannie Cupples at the time of the commission of the alleged offense. The question propounded to him on the cross-examination and his answer thereto denying the matter

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or statements embraced therein are all set out in the information and affidavit. The evidence which the State sought to elicit by the question propounded appears to have been material for the purpose of contradicting or impeaching the statements of the accused which he made on his direct examination as a witness, to the effect that he had not perpetrated the assault on the injured party as charged. The inquiry in relation to these admissions and declarations was intended, it appears, to call forth evidence, not for the purpose of proving the assault in question, but solely for the purpose of laying the foundation for impeaching the accused as a witness by showing that the statements or declarations which he had made out of court contradicted those which he made upon the witness-stand. The perjury in question is assigned on his denial that he made the declarations in dispute.

The State's contention is that the affidavit and information are in all respects sufficient, and that appellee's objections thereto are wholly untenable. In this insistence we concur. While the pleadings in controversy can not be said to be models in their character, still by the facts therein averred they sufficiently charge the offense of perjury. One of the objections urged on the part of appellee against these pleadings is that, by reason of the fact that he is charged to have testified falsely in response to a question propounded to him on cross-examination for the purpose of impeaching him as a witness, it is contended that he can not be held to have committed perjury thereby unless it is shown that the time and place was fixed when and where he made the declarations to Tumbleson. There is certainly no merit in this contention. Appellee was the defendant in the case in which it is alleged he committed the perjury, and his declarations tending to prove the offense for which he was accused might have been introduced by the State as evidence against him in chief. Nevertheless, in the event he became a witness in his own behalf, and, by the evidence which he gave, denied

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that he had committed the assault and battery in question, the State, on laying the proper foundation on cross-examination might have introduced the declarations in question, without giving them in chief, for the purpose of impeaching him or affecting his credit, as they were inconsistent with the evidence which he gave as a witness in respect to the matter in issue. Of course, by reason of a well settled rule, he would not have been required to answer the question unless the person was mentioned to whom or in whose presence the alleged statements or declarations had been made by him; and the State would also have been required, as near as could be done under the circumstances in the particular case, to fix the time when, and the place where, they had been made by the witness. The rule, however, in such cases, requiring the time and place to be fixed, is for the benefit of the witness, and ordinarily he can not be compelled to answer the impeaching question unless the time and place are fixed. Still if he does respond without exacting this right, and thereby wilfully and corruptly answers falsely, it surely could not be claimed that he was not guilty of perjury. So in this case, if the testimony which appellee gave in answer to the inquiry about the material statements which were claimed he had made outside of court, was wilfully false, he was no less guilty of perjury by reason of the fact that the time and place where he made the alleged declarations were not mentioned in the interrogation.

The authorities fully affirm that while a matter which only goes to affect the credit of a witness who has testified on a trial of a cause, is collateral to the principal issue therein, nevertheless it is perjury for one to swear falsely to anything materially affecting the credibility of a witness. 2 Bishop, Crim. Law (8th ed.), §§1032, 1038.

It is further asserted by counsel for appellee that it appears that he was acquitted by the jury of the charge preferred against him in the case wherein the perjury is assigned, and hence the information was properly quashed

State, *ex rel.*, v. Perry.

for the reason that his acquittal discloses the fact that the testimony which he gave and upon which the perjury is predicated, was true instead of false. This certainly is a novel contention. The acquittal of the appellee in that case affords no ground for the contention that he did not commit the crime of perjury charged in the information and affidavit.

We conclude that the lower court erred in sustaining the motion to quash the information and affidavit, for which error the judgment is reversed, and the cause remanded, with instructions to the court to overrule said motion.

STATE, EX REL. BEHYMER, v. PERRY,
AUDITOR.

[No. 19,799. Filed November 25, 1902.]

MANDAMUS.—*Argumentative Answer.*—In a mandamus proceeding, it is not error to overrule a demurrer to an argumentative answer or return if it alleges facts in bar of the action. *p. 509.*

COUNTIES.—*Claim.*—*Allowance by Commissioners.*—*Mandamus to Compel Auditor to Issue Warrant.*—Since the county commissioners act in an administrative and not in a judicial capacity, the order of the board allowing a claim is only *prima facie* evidence of its correctness; and in a mandamus proceeding to compel the county auditor to issue a warrant for a claim allowed by the commissioners, such auditor may question the legality of the allowance. *pp. 509, 510.*

From Tipton Circuit Court; *L. J. Kirkpatrick*, Special Judge.

Mandamus by the State on the relation of John O. Behymer against Elijah Perry, county auditor, to compel the issuance of a warrant. From a judgment for defendant, plaintiff appeals. *Affirmed.*

J. M. Fippen, J. M. Purvis, Gifford & Gifford, John Oglebay and W. R. Oglebay, for appellant.

Dan Waugh, for appellee.

GILLET, J.—This was an action to compel appellee, by mandate, to issue to appellant's relator a warrant in pay-

ment of an allowance made to him by the board of commissioners of Tipton county.

The first paragraph of the amended petition contains the allegation that the allowance was for and on account of an indebtedness for the publication of the reports of the receipts and disbursements of the auditor and treasurer of said county for the year ending in June, 1899. The second paragraph of said amended petition alleges the making of an allowance in payment of an indebtedness, the character of which is not stated, while the third paragraph of said amended petition alleges that the allowance was based on an indebtedness for publishing a report of the "receipts and expenditures as made by said board for the year ending June, 1899." The record does not show whether an alternative writ issued. Appellee filed two paragraphs of return. In each of said paragraphs it is alleged that the allowance was not based on a legal claim against said county, for the reason, among others, that the allowance was for publishing the reports made by the auditor and treasurer of said county of their respective receipts and disbursements for said year. Relator unsuccessfully challenged the sufficiency of these paragraphs by demurrer, and, upon the overruling thereof, excepted and refused to plead further.

The paragraphs of return did not allege any new matter in answer to the first paragraph of the amended petition, and, as an answer to the third paragraph of petition, said paragraphs of return only amount to an argumentative denial of a portion of the allegations of said paragraph of petition. It is not error, however, to overrule a demurrer to an argumentative answer or return, if it alleges facts in bar of the action. *Oren v. Board, etc.*, 157 Ind. 158, and cases there cited.

It is not contended by appellant's counsel that a board of commissioners has authority to make an allowance for such a service as the return alleges was the basis of the allowance by the commissioners, but counsel contend that the allow-

ance of said board was in the nature of a judgment, that, in the absence of an appeal, concluded all parties. In this contention counsel are in error. In the allowance of claims against a county, the board of commissioners thereof act in an administrative and not in a judicial capacity, and for this reason their order allowing a bill is only *prima facie* evidence that it is correct. These propositions are clearly affirmed by our later cases. *Board, etc., v. Heaston*, 144 Ind. 583, 55 Am. St. 192; *Sudbury v. Board, etc.*, 157 Ind. 446. It was held in the cases last cited that an action would lie on behalf of the county to recover for moneys paid on allowances against the county that were illegally made. This being the law, we think that the auditor had the right to raise the question when it was sought to compel him to order the money paid out of the county treasury. See *Rudisill v. Edsall*, 43 Ind. 377; *Barr v. State, ex rel.*, 148 Ind. 424; *Monroe v. State, ex rel.*, 157 Ind. 45.

The first paragraph of the amended petition did not state a cause of action, and the two paragraphs of return were sufficient in substance as against the other paragraphs of amended petition.

Judgment affirmed.

THE BALTIMORE AND OHIO SOUTHWESTERN RAIL-
ROAD COMPANY v. STATE, EX REL.
GREENWOOD, TRUSTEE.

[No. 19,800. Filed November 25, 1902.]

PLEADING.—*Mandamus.*—*Township Trustee.*—A complaint in a *mandamus* proceeding on the relation of the township trustee is not defective because the trustee is described therein as the trustee of the civil township, though the word "civil" might have been omitted without detriment to the complaint. *p. 515.*

MANDAMUS.—*Petition.*—*Affidavit.*—*Township Trustee.*—The affidavit in verification of a petition by a township trustee for a writ of *mandate* is not required to be made by the relator in his official capacity. *p. 515.*

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Baltimore, etc., R. Co. v. State, *ex rel.*

MANDAMUS.—*Petition.*—*Railroads.*—*Highway Crossing.*—A petition in mandamus to require a railroad company to construct a highway crossing is not defective in failing to specify the character of the notice given in the highway proceeding, where it is alleged that due and legal notice was given as required by statute. p. 516.

RAILROADS.—*Duty to Maintain Highway Crossings.*—The duty imposed by statute upon railroad companies to keep highway crossings in reasonably safe condition for travel applies to crossings of highways laid out after the construction of the railroad as well as to those in existence at the time of its construction. pp. 516-519.

SAME.—*Right of Way.*—*Highways.*—A railroad company acquires its right of way subject to the right of the State to extend public highways and streets across such right of way. p. 519.

SAME.—*Highway Crossings.*—*Mandamus.*—*Estoppel.*—The fact that a railroad company may be subject to an expense in the construction of a highway crossing is not a legitimate defense to a mandamus proceeding to require the construction of the crossing; since the question of damages, if any, arising out of the location of the highway over the railroad right of way, should have been presented for consideration and allowance to the board of commissioners in the proceeding to establish the highway. p. 521.

SAME.—*Highway Crossings.*—*Notice.*—*Constitutional Law.*—*Mandamus.*—The fact that an interstate railroad company had no actual notice of a highway proceeding, and did not appear thereto, and was awarded no damages, does not entitle it to be awarded damages in a mandamus proceeding to require it to construct a highway crossing; and the denial of such claim is not a taking of property without due process of law and without just compensation in violation of the fourteenth amendment of the federal Constitution. pp. 521, 522.

From Daviess Circuit Court; *H. Q. Houghton*, Judge.

Mandamus by State on the relation of John W. Greenwood, trustee of Washington township, Daviess county, against the Baltimore & Ohio Southwestern Railroad Company, to compel the latter to construct a highway crossing. From a judgment awarding the writ, respondent appeals. *Affirmed.*

W. R. Gardiner, C. G. Gardiner, T. D. Slimp and Edward Barton, for appellant.

J. W. Ogden, Ephraim Inman, D. J. Hefron and Charles Harrington, for appellee.

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JORDAN, J. — The State on the relation of John W. Greenwood, trustee of Washington township, Daviess county, Indiana, prosecuted this action in the lower court to secure a writ of mandamus to compel appellant to put a certain described public highway at a point where it crosses the right of way of appellant's railroad in a condition so as to enable the public safely to use the same at the said crossing without interference. A trial upon the issues joined resulted in appellee being awarded a peremptory writ of mandamus commanding appellant to make and put the said highway at the said crossing of appellant's right of way in such a condition as will enable the public freely to use the highway at that point, and so as to afford security to life and property. The errors assigned are predicated on the decisions of the court in overruling a demurrer for insufficiency of facts to the alternative writ, in overruling a motion to quash the same, and in denying a motion for a new trial.

The facts as set out in the petition and in the alternative writ appear to be as follows: Appellant owns and operates a railroad running from Parkersburg, West Virginia, to St. Louis, Missouri. This road, on its route, runs through Washington township, Daviess county, Indiana. In the year 1898, and prior thereto, and at the time the highway herein involved was established and laid out, this railroad was owned and operated by a railroad company known and denominated the "Baltimore, Ohio & Southwestern Railroad Company," which as alleged was incorporated under the laws of the State of Indiana. At the September term, 1898, of the board of commissioners of Daviess county, Indiana, proceedings before said board appear to have been properly instituted for the location and establishment of a certain public highway proposed to be located through a portion of Washington township in said county, and across and over the right of way of said railroad company in said Washington township. Notice, as prescribed by the highway statute, seems to have been given in respect to the pend-

ency of said proceedings before the board; and such steps appear to have been taken therein as resulted in the board of commissioners at its December term, 1898, ordering said highway to be established, laid out, and opened, as located by the viewers over and across the several tracts of land mentioned, including appellant's right of way herein involved. After the board of commissioners had made the final order establishing the highway as laid out and located, and subsequent to the opening of and putting the highway, by the proper officials, in a condition for travel thereon, except as to that part thereof which crosses the right of way in question, appellant, by and through certain proceedings had in the federal court, and by virtue of certain transfers, succeeded to all of the rights, titles, franchises, privileges, and property of the above mentioned company. At the time of said succession it had full knowledge of the location and establishment of the highway across the right of way of its predecessor at the particular crossing in dispute. Appellant's predecessor, it appears, was made a party to said highway proceedings, but had no actual notice of their pendency, and in fact had no notice save and except the constructive notice provided for by the statute. As to which particular method of giving the notice prescribed by the statute,—whether by publication in a newspaper, or by posting notices in public places in the vicinity of the proposed highway,—was employed, is not clearly disclosed. Appellant's predecessor, however, it appears, wholly failed to appear in said proceedings and filed no remonstrance, and made no claim therein for damages by reason of the proposed highway being located across its right of way at the intersection in controversy. The relator is shown to have been duly elected at the general election held in November, 1900, trustee of said Washington township, and duly qualified as such official, and was so acting at the time this action was instituted. At the time the highway in dispute was

established and laid out, there was a high embankment on appellant's right of way at the point where it was crossed by the highway, and this embankment was used by appellant's predecessor as a roadbed at that point. The top of this embankment was ten feet above the level of the highway, and above the general level of the ground in the vicinity thereof on the north and south of said right of way. This embankment, as maintained by the railroad company, obstructs the highway at the point where it and the right of way cross each other, and prevents the highway from being used by the public at said crossing, and so interferes with travel thereon at said crossing as to render the highway at that point of no use as a public road. After the establishment and opening of the highway, as heretofore stated, it is disclosed that appellant, in the year 1900, further elevated this embankment on its right of way at the point of intersection, so as to make the height thereof at least eighteen feet above the level of the highway, by dumping or placing thereon large quantities of earth and gravel, and said elevation was extended to the distance of 100 yards and more, and serves to and does wholly prevent the free use of the highway by the public at said crossing. After this embankment was raised or elevated as shown, it resulted in rendering the approaches of the highway to the railroad crossing so steep and high as wholly to debar or prevent the public from using the road at this railroad crossing. By reason of the condition in which appellant's railroad has been constructed and is maintained by it at the point where it intersects the highway, no security is afforded for the life and property of persons traveling over the highway at said railroad crossing. After the establishment and opening of this public road, as previously shown, and before the commencement of this action, it appears that the proper township trustee duly notified appellant of the condition of its said right of way at the crossing of the highway, and requested and demanded that it proceed to put the crossing in question

in such a condition as would enable the public freely and safely to use the highway at the crossing; with all of which demands appellant refused to comply, and still refuses.

Appellant's first contention is that there is no legal relator shown in this prosecution, for the reason that the trustee named is described or designated in the pleading as the trustee of Washington civil township, instead of the trustee of Washington township; second, that the petition is not shown to have been legally verified, for the reason that the affidavit thereto was made by Greenwood in his individual capacity, instead of his official. But the relator is shown to be the trustee of Washington township, and as such he is certainly appearing and acting herein as the trustee of the civil township, and not of the school township. The law recognizes that there are two corporations within the territory included within Washington township. One is Washington township of Daviess county, and the other is Washington school township. The first is known as the civil township and the other as the school township organized for school purposes. This distinction is made by the statutes pertaining to our common schools, and has been repeatedly recognized by the decisions of this court. *Car-michael v. Lawrence*, 47 Ind. 554; *Jackson Tp. v. Home Ins. Co.*, 54 Ind. 184; *Wilcoxon v. City of Bluffton*, 153 Ind. 267.

While not necessarily required in this case, nevertheless it was proper for the relator to designate himself as trustee of Washington civil township of Daviess county, Indiana. The word "civil" might have been omitted without detriment to the petition.

In respect to the second contention it may be said that under §1183 Burns 1901, the affidavit in verification of the application or petition for the writ of mandate was not required to be made by the relator in his official capacity. The petition may be verified by any person competent to make an affidavit.

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It is next insisted that the petition and alternative writ are uncertain in not specifying the character of the notice given in the highway proceedings. It is alleged in the petition and alternative writ herein "that due and legal notice of the filing and pendency of said petition and application for the location and establishment of said highway and of the time and place set for hearing the same was duly given to said * * * Baltimore & Ohio Southwestern Railroad Company, as required by statute in such cases made and provided." It is insisted that this is too uncertain, for the reason that it is not disclosed thereby which method of giving the notice prescribed by §6742 Burns 1901, was employed, —whether by posting notices in three public places in the vicinity of the proposed highway, or by publication in a newspaper. But the facts, however, do show that the highway in controversy was, by the board of commissioners of Daviess county, at its regular session, ordered to be established, laid out, and opened, in certain proceedings had before the board for that purpose. As that tribunal is, under the statute, invested with exclusive, original jurisdiction in such highway proceedings, it may, under the circumstances, so far as the case at bar is concerned, in the absence of anything to the contrary, be presumed that by reason of the fact that the board is shown to have entertained the petition for the highway in question, and ordered the same to be established and laid out, that it first found that the required notice had been given through the means at least of one of the methods prescribed by the statute to appellant's predecessor, and all other landowners affected by the location of the highway. *Jones v. Cullen*, 142 Ind. 335, and cases there cited.

Again, upon another view, if the petition in the case at bar is too uncertain, as claimed, the question should have been presented by motion to make the pleading more specific. *Falley v. Gribbling*, 128 Ind. 110; *Potter v. Knox*

County Lumber Co., 146 Ind. 114; *Clow v. Brown*, 150 Ind. 185.

The gist of the relief sought and awarded under the facts in this case is that appellant be required to put its right of way at the crossing in question in such a condition as to enable the public to use the highway at that point, without interference, for the purpose of travel, and so as to afford reasonable safety or security to the property and lives of those passing over the highway at the crossing. The facts disclose that this public road, as established and laid out, is being used at all points along the route thereof, except at the crossing on appellant's right of way, which, by reason of the condition, as shown, in which appellant has placed and maintains its roadbed and right of way at that point, the public is virtually prevented from using the highway; or, in other words, from the facts alleged it is evident that this public road as established can not be used for travel as an entirety, as intended, but can be used only in parts; or, more clearly stated, it is susceptible of being used by the public at all other points along the line thereof, except at the crossing in controversy. Counsel contend that by this action it is sought to compel the railroad company to put the highway crossing not only in a condition so as to be passable, but also to make it convenient for travel usual to public highways, and to require the company to do all of the work, and bear all of the expense in the performance thereof, which it is claimed will amount to \$3,000. This amount as damages, it is asserted, appellant at the trial offered to and was prepared to prove, but its offer, over its exceptions, was rejected.

We previously stated what, in effect, was the relief sought and awarded in this proceeding, and we do not perceive wherein appellant, under the circumstances, will be compelled to discharge any duty other than that which the law exacts. We may repeat that what appellant, in effect, under the writ of mandate, is required to do, is to put the highway

crossing in a reasonably safe and fit condition for travel by the public thereover. By the fifth clause of §5153 Burns 1901, §3903 Horner 1901, which forms a part of the general laws of this State pertaining to railroad companies, a railroad company is authorized "To construct its road upon or across any stream of water, watercourse, road, highway, railroad or canal, so as not to interfere with the free use of the same, which the route of its road shall intersect, in such manner as to afford security for life and property; but the corporation shall restore the stream or watercourse, road or highway, thus intersected, to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises."

The authorities, as a general rule, affirm that it is the duty of every railroad company to construct and maintain its crossings over highways in a reasonably safe and good condition for travel, so far as the same can be done without interfering with the operation of the railroad. Elliott, Railroads, §1102.

Mr. Pierce, in his work on railroads, says: "The laying of a railroad across highways often requires excavations and erections, and a greater or less change in the surface. The duty, however, to restore the highway as far as may be to its former condition, and to erect and maintain structures necessary for such restoration, is presumed to be incumbent on the company, even without any express requirement imposed by statute. The duty to restore it to its former condition so as not to interfere materially with its usefulness, and to make the crossing safe and convenient for the public, is usually imposed by statute. It is a continuing duty, and binds other corporations which succeed to the ownership or possession of the railroad. It is to be substantially rather than literally performed." Pierce, Railroads, 245.

In Elliott, Railroads, §1102, the authors say: "Where the duty is imposed by statute the weight of authority is to the effect that it applies to crossings of highways laid out

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after the construction of the railway, as well as to those in existence at the time of its construction." Such is the interpretation given to clause five of §5153, *supra*, by the decisions of this court. See *Louisville, etc., R. Co. v. Smith*, 91 Ind. 119; *Evansville, etc., R. Co. v. Carvener*, 113 Ind. 51; *Evansville, etc., R. Co. v. State, ex rel.*, 149 Ind. 276, and cases there cited; *Lake Erie, etc., R. Co. v. Cluggish*, 143 Ind. 347.

In the appeal of *Louisville, etc., R. Co. v. Smith, supra*, the court, in construing clause five, *supra*, said: "Whether the highway is laid out and opened *before* or *after* the construction of the railroad, the legislative intent in the clause quoted is clear, we think, that the railroad company shall construct its road, at its intersection with such highway, 'in such manner as to afford security for life and property.'" (Our italics.)

Inasmuch as the public are entitled to have highways to meet the requirements of the increased growth of business and population, therefore the general rule is well affirmed that every railroad corporation acquires its right of way subject to the right of the State to extend public highways and streets across such right of way. *City of Ft. Wayne v. Lake Shore, etc., R. Co.*, 132 Ind. 558, 18 L. R. A. 367, 32 Am. St. 277; *City of Terre Haute v. Evansville, etc., R. Co.*, 149 Ind. 174, 37 L. R. A. 189; *Gold v. Pittsburgh, etc., R. Co.*, 153 Ind. 232; *Chicago, etc., R. Co. v. City of Chicago*, 140 Ill. 309, 29 N. E. 1109; *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 388, 44 Am. Rep. 799; Elliott, Railroads, §1098. Were this not the rule, then, as the authorities properly affirm, the grant by the State of the privilege to construct and operate railroads across or through its territory, instead of conducing to the progress and prosperity of the people, would prove to be a serious obstacle in the way of their future prosperity or progress. See authorities last above cited.

A standard authority on public highways, in speaking of the legislative control over railroad companies in regard to the crossings of highways, says: "Such corporations are largely under the control of the legislature in the exercise of its police power. It may regulate the use of highways by a railroad company by requiring the crossings to be made in a particular manner; and may even impose upon the company the duty of adapting the track and the grade to new highways, so as to make the crossing safe and convenient." Elliott, Roads and Sts. (2d ed.), §778. See, also, Elliott, Railroads, §§1102-1109.

In §1107 of the work last mentioned, it is said: "At every crossing something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make the highway safe for use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveler to get on, over and off the crossing in safety. Proper approaches and embankments necessary to enable a traveler to reach and leave the crossing are a part of the crossing and the railway company must construct and maintain them."

Under the express language of our statute, above set out, the railroad company is authorized to construct its road across a highway so as not to interfere with the free use of the same, and in such a manner as to afford security to life and property. This requirement of the law, as we have seen, not only applies to its crossings over highways in existence at the time the railroad was constructed, but is equally applicable to a crossing over a highway laid out and established after the construction of the railroad; hence, in view of the facts in this case, appellant, under the law, must be held to be obligated to adapt and maintain its crossing over the highway in dispute so as not to interfere with the free use thereof at that point, and also to be constructed and maintained in such a manner as to afford reasonable

safety or security for the lives and property of travelers using the highway at the crossing. *Chicago, etc., R. Co. v. State, ex rel.*, 158 Ind. 189; *Chicago, etc., R. Co. v. State, ex rel., ante*, 237.

The mere fact that appellant may be subjected to expense in the discharge of this duty is not a matter of legitimate defense in this action, consequently the trial court, under the circumstances, did not err in refusing to permit it to prove the expense to which it would be subjected in the discharge of the required duty. Such damages, if any, so far as legitimate, arising out of the location of the highway over the railroad company's right of way, were matters which appellant's predecessor might have presented for consideration and allowance before the board of commissioners in the proceeding to lay out and establish the highway in question. But this it neglected to do, and appellant, as its successor, under the circumstances in this case, stands in its shoes, and is bound and estopped by such proceeding before the board of commissioners in like manner as the company through whom it claims would be precluded and bound were it a party defendant in this action. *Gold v. Pittsburgh, etc., R. Co.*, 153 Ind. 232.

Under the circumstances, appellant's predecessor must be considered as having had its day in court in respect to the establishment of the highway in dispute, and in regard to the damages, if any, arising out of its being located over the right of way. The statute governing proceedings for the establishment of highways before boards of commissioners, provides ample opportunity and means for all persons affected by the location of the proposed highway to be heard in opposition thereto, and also the right to be heard upon any claim or demand for damages which they may assert in such proceedings.

It is further insisted by appellant's learned counsel that because it appears that neither appellant, an interstate railroad company, nor its predecessor, had any actual notice of

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the highway proceedings, and did not appear thereto, and was awarded no damages, consequently it should be held that appellant had the right in this case to prove and be awarded damages; otherwise, it is asserted, appellant will be deprived of its property without due process of law, and the same will be taken for public use without just compensation in violation of the fourteenth amendment of the federal Constitution, and §21 of the bill of rights of the Constitution of this State.

It is further contended that because the highway statute does not provide for actual notice, appellant's property has been taken and appropriated without due process of law, and without just compensation, and the contention is advanced that the statute is, therefore, antagonistic to the federal and State Constitution. These contentions are without merit and wholly untenable. A proceeding to establish a highway under the statute of this State, before boards of commissioners, is one *in rem*, and constructive notice is provided to be given to those who will be affected by the establishment or location of the highway. Appellant's predecessor, as it appears, had the benefit of such notice. This was sufficient to give the board of commissioners jurisdiction over that company, and to bind it by the order made in the proceedings before the board. *Tucker v. Sellers*, 130 Ind. 514; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616.

Further answering appellant's contention, we may say that we recognize nothing in our highway statute which can be said to be violative of any provision of either the federal or State Constitution. The question in respect to appellant's being bound in like manner as its predecessor by the order of the board establishing or locating the highway in controversy is ruled and settled by the decisions of this court in *Gold v. Pittsburgh, etc., R. Co.*, 153 Ind. 232.

We have read the evidence and are satisfied that it sustains the judgment, and, as we find no error, the judgment is affirmed.

HOGAN v. CITY OF INDIANAPOLIS.

[No. 19,909. Filed November 25, 1902.]

MUNICIPAL CORPORATIONS. — Vehicle License. — Taxation. — Police Power. — City of Indianapolis.—The owner and user of a vehicle subject to a license fee imposed by an ordinance enacted pursuant to clauses 12, 36, and 39 of §3106 R. S. 1881 authorizing cities to regulate the use of vehicles, may also be required to pay the tax imposed by an ordinance enacted pursuant to §3794 Burns 1901, authorizing certain cities to impose a vehicle tax; the first being imposed under the police power, and the second under the taxing power of the city.

From Marion Superior Court; *Vinson Carter*, Judge.

William J. Hogan was convicted of violating a city ordinance imposing a vehicle tax, and appeals. *Affirmed.*

O. H. Carson, for appellant.

F. A. Joss, T. C. Whallon and C. E. Averill, for appellee.

JORDAN, J.—Appellant appeals from a judgment convicting him of having violated a certain ordinance passed by the common council of the city of Indianapolis on November 27, 1893. He is accused in this action of having used a one-horse wagon owned by him in and upon the streets and thoroughfares of said city without first having paid the license tax as required by the provisions of that ordinance. In 1880 appellee, a municipal corporation, was acting under and governed by the general laws of this State pertaining to the organization and government of cities. Among the enumerated powers conferred upon the common councils of cities by clauses twelve, thirty-six, and thirty-nine, of §3106 R. S. 1881 and Horner 1901, of said general statutes, are the following: “12. To regulate the use of coaches, hacks, drays and other vehicles for the transportation of passengers, freight, or other articles, to or from points within the city, for hire or pay.” “36. To establish stands for hackney-coaches, cabs, and omnibuses; to enforce the observ-

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ance and use thereof; and fix the rates and prices for transportation of persons and property from one part of the city to another." "39. To regulate the speed of horses, carriages, locomotives, and other vehicles within the city."

In pursuance of these provisions appellee's common council and board of aldermen, as it appears, on March 1, 1880, duly passed and adopted an ordinance which consists of some thirty sections, and which is entitled: "An ordinance declaring that all vehicles, except street railway cars, used in the transporting of persons and articles within the city of Indianapolis, for hire or pay, shall be deemed 'public vehicles;' establishing rules and regulations for the government of the owners, lessees, and drivers thereof; and prescribing fines and punishments for violations of its provisions." Sections one and two of this ordinance read as follows: "Section 1. Be it ordained by the common council and board of aldermen of the city of Indianapolis, that omnibuses, hackney carriages, barouches, landaus, cabs, chariots, wagons, drays and all other similar vehicles (except street cars), whether on wheels or runners, drawn by one or more horses or other animal power, which may be used in conveying or transporting persons, baggage, freight or other articles, from point to point within the city of Indianapolis, for hire or pay, shall be deemed 'public vehicles;' and the owners, lessees, and drivers thereof shall be directed and controlled by the rules and regulations hereinafter set forth. Section 2. It shall be unlawful for any person to own or rent, and to use or permit to be used, any vehicle in the conveying or transporting of persons or articles in or upon the thoroughfares of the city of Indianapolis, without first paying into the city treasury the license tax in the next succeeding section set forth, having such vehicle duly numbered and registered by the city clerk and obtaining a public vehicle license therefor. Any person who shall use or operate any vehicle in violation of the requirements of this section shall be fined in any sum not exceeding \$10; and each

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day's continuance of such violation after conviction thereof, shall constitute a fresh offense."

Other sections of this ordinance fix the fee to be paid for a license to exercise the right of using the public vehicles mentioned in the first section, for the purpose of conveying and transporting persons, baggage, freight, and other articles in and through the city for hire or pay; while others provide for the issuing of the required license, and for the establishment of stands for public vehicles, and the prices that may be exacted for the transportation of passengers, etc., while others prescribe the qualifications of those serving as drivers of such vehicles, and providing that the license contemplated by the ordinance shall only be issued to owners or lessees of public vehicles. This ordinance, except some minor parts thereof, is treated by the parties in this appeal as being in full force and effect.

In 1891 the city of Indianapolis passed under the control of a statute enacted by the legislature in that year, and intended for the government of cities having a population of 100,000. See §3772 *et seq.* Burns 1901. Among the powers conferred on appellee's common council by the provisions of section twenty-three of this latter act (§3794 Burns 1901) are the following: "To license, tax, and regulate wheeled vehicles, provided that the funds derived therefrom *shall be applied only to the maintenance and repair of streets and alleys.*" (Our italics.)

Under the authority so conferred, the common council, it appears, passed the ordinance of 1893, which appellant was convicted of having violated. Sections one, three, six, and seven of this ordinance read as follows: "Section 1. Be it ordained by the common council of the city of Indianapolis, that the owners of all vehicles used upon the streets of the city of Indianapolis, shall pay annually license fees as follows, viz.:" (Then follows a schedule of the amount of tax to be paid for the use of each vehicle.) "Section 3. That any person included in the provisions of this ordinance

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desiring to use the streets of said city, shall pay or cause to be paid to the city treasurer for each vehicle, the license fee as herein provided, and take his receipt therefor, and upon presentation of said receipt to the city comptroller, said city comptroller shall issue a license to the owner of said vehicle. It shall be unlawful for any person or persons owning any vehicle included in the provisions of this ordinance to use the streets of said city without first securing a license as herein provided." "Section 6. This ordinance shall in no manner affect the license fees as now paid the city by different lines of business under the existing laws and ordinances, but shall be in addition to any license fee or charge now required under the ordinances heretofore enacted. Section 7. The funds derived from the license herein provided for shall be applied only to the maintenance and repair of the streets and alleys of the city of Indianapolis."

It is disclosed by the agreed statement of facts in this case that appellant, at the dates charged in the complaint, was the owner of a one-horse wagon which he used and permitted to be used as a public vehicle for pay or hire in transporting and conveying articles of merchandise in and through the thoroughfares and streets of the city of Indianapolis, and that he used said vehicle generally upon said streets. It appears that at the time he was engaged in using his wagon as aforesaid, that he had not complied with the ordinance of 1880 as therein provided, and had not complied with that of 1893 by paying the tax thereby required for using vehicles on and over the streets of said city. It is further disclosed, however, that before the commencement of this prosecution, he tendered to appellee in legal tender money the license fee required by the ordinance of 1880, which was refused, and the money so tendered was by him paid into court for the use of appellee.

The single question which appellant, under the facts, seeks to present, is whether he, as the owner and user of a public vehicle and amenable as such owner to the ordinance

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of 1880, will also be required to pay the tax exacted by the ordinance of 1893, for using his wagon on and over the streets of the city, in the conveyance and transportation of baggage, freights, and other articles, for hire or pay. If the latter ordinance can be so construed as to embrace him within its provisions, then it is insisted by his counsel that it must be held invalid as to him for the reason asserted that he can not, for the privilege of using appellee's public streets, be subjected to the payment of a license fee, and, also, at the same time, to the payment of a tax for the exercise of the same right. It is contended that although the ordinance of 1880 may have been adopted by appellee in the exercise of its police power, and that the ordinance of 1893 may have been passed in the exercise of the taxing power, still it is contended that this fact can make no difference, as both of these ordinances assume to grant the same privilege.

An examination of the ordinance of 1880 fully discloses that the city in adopting it simply exercised the police power with which it was invested under the authority conferred by the legislature. It is settled beyond controversy that appellee properly could, in the exercise of such power, under the provisions of the general law pertaining to cities to which we have herein referred, require all persons engaged in the occupation of running or operating hacks, drays, coaches, and other public vehicles therein for pay, as a condition to this privilege, to take out or secure the license provided by the ordinance of 1880. The object or purpose of such a requirement or regulation, is to subject the occupation of running or operating public vehicles to police surveillance and supervision, and thereby prevent such business from being conducted in a manner harmful to the public.

A standard authority says: "Whatever refinements of reasoning may be indulged in, there are but two substantial phases to the imposition of a license tax on professions and

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occupations. It is either a license, strictly so-called, imposed in the exercise of the ordinary police power of the state, or it is a tax, laid in the exercise of the power of taxation." Tiedeman, State and Fed. Control, 479.

The exacting of a license fee by an ordinance adopted by virtue of the police power, does not, and properly should not, as a general rule, contemplate, except incidentally, the raising of revenue. That the general purpose or object of the ordinance of 1893 is to raise revenue for the maintenance and repair of the streets of the city, is certainly evident. In fact such purpose is expressly declared in the ordinance, while the provision of section twenty-three of the charter upon which that ordinance is based, provides that the funds so raised be so applied. That the license tax imposed by the latter ordinance was laid by appellee in the exercise of its power of taxation under the authority conferred by section twenty-three of its charter, is certainly manifest. This proposition is settled by the decision of this court in the appeal of the *City of Terre Haute v. Kersey*, ante, 300.

It appears to be conceded by counsel for appellant that the latter is amenable or subject to the police regulations of the ordinance of 1880. That appellee may, in addition to exacting of him obedience to the police regulations provided by that ordinance, also require him to pay the tax laid and imposed by the ordinance of 1893, in our opinion, can not be successfully controverted. The latter ordinance by its broad and positive provisions discloses that it was intended to include and apply to the owners of all vehicles, whether private or public, used upon the streets for any purpose. This ordinance does not contemplate taxing the vehicles as property, but simply imposes the tax upon the owners thereof for using them on and over the public streets. *City of Terre Haute v. Kersey*, supra.

This requirement is consistent with reason and justice, for it is a well recognized fact that it is the use of vehicles

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on the streets of a city which, in the main, causes the wear and tear of such streets and the tax exacted is authorized and intended by the statute to reimburse the city, in part at least, for the great expense to which it is subjected in the maintenance and repairs of its public streets.

Without further comment we conclude that appellant is amenable to the provisions of the ordinance of 1893, and the mere fact that he must also yield obedience to the ordinance of 1880, does not render that of 1893 invalid as to him, as contended by his counsel; neither do the ordinances in question profess, as contended by appellant, to grant to him the same privilege.

It follows that the conviction of appellant by the lower court under the facts was right, and the judgment is therefore affirmed.

OATHOUT ET AL. v. SEABROOKE ET AL.

[No. 19,908. Filed November 25, 1902.]

DRAINS.—*Dismissal of Proceedings by County Commissioners.*—*Appeal.*—No appeal will lie to the circuit court from a judgment of dismissal rendered by the board of county commissioners upon a negative report of reviewers in a proceeding to establish a ditch, under §5655 Burns 1901.

From Jackson Circuit Court; *T. B. Buskirk*, Judge.

Petition by Aaron M. Seabrooke and others to establish a drain. From a judgment of the circuit court reversing a dismissal of the proceedings by the county commissioners, remonstrators appeal. *Reversed.*

J. F. Applewhite, Ralph Applewhite and O. H. Montgomery, for appellants.

HADLEY, C. J.—Appellees filed with the board of commissioners their petition, under the drainage act of September 19, 1881, §5655 Burns 1901, for the construction of a ditch. The court appointed viewers who reported that the

ditch would be of public utility, whereupon appellants filed remonstrances, and the commissioners appointed reviewers who reported that the proposed ditch would not be of public utility; which report was approved by the commissioners, and the proceeding dismissed at the cost of the petitioners. The petitioners appealed to the circuit court. In the latter court the remonstrators, appellants, moved a dismissal of the appeal for want of jurisdiction. The motion was overruled. Trial, finding, and judgment for the petitioners that the proposed ditch would be of public utility, and that the petitioners recover of the remonstrators their costs.

The controlling question is the action of the circuit court in overruling appellants' motion to dismiss the appeal from the commissioners. The judgment of the commissioners appealed from was the dismissal of the proceeding upon the report of the reviewers that the drain would not be of public utility, in accordance with §5668 Burns 1901. This was the only judgment the commissioners had authority to render upon such a report. The seizure of private property by the State, through county commissioners, for the construction of highways and ditches, is an assertion of the right of eminent domain, which can be exercised only in cases where some public benefit is to be subserved. The commissioners have no power to enter upon lands, lay out and construct roads and ditches when only private interests are involved, and no power to act upon such subject until they have first ascertained, by the means provided by law, that some public benefit is to be promoted thereby. That fact is therefore jurisdictional, and must be determined under this and the highway act, by viewers or reviewers sent out for that purpose. The fact once established by the report of the viewers, the law directs what judgment shall be rendered. If the finding is in favor of the public welfare the commissioners may proceed. If the finding is that the public will not be benefited,—and therefore the court without jurisdiction,—the only further step the com-

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missioners can take is to dismiss the action, and thus end the proceedings on that petition. Exclusive original jurisdiction for the location and opening of highways and for the construction of drains under the act of 1881 being in county boards of commissioners, circuit courts can acquire no jurisdiction by appeal in cases where the commissioners had none. Consequently this court has uniformly held in highway cases, under an analogous statute, §6751 Burns 1901, that no appeal will lie from a judgment of dismissal rendered upon a negative report of viewers or reviewers. *Helms v. Bell*, 155 Ind. 502; *Bowman v. Jobs*, 123 Ind. 44; *Jones v. Duffy*, 119 Ind. 440; *McKee v. Gould*, 108 Ind. 107. The same principle applies to drainage cases under the act of 1881.

Under the facts of this case, the commissioners having acquired no jurisdiction to construct the drain, none was conferrable upon the circuit court, and the appeal thereto should have been dismissed.

Judgment reversed with instructions to sustain appellants' motion to dismiss the appeal.

WOLF v. SHELTON.

[No. 19,591. Filed December 9, 1902.]

VENDOR AND PURCHASER.—*Purchase-Money Notes.*—*Transfer.*—*Liens.*—*Set-off.*—A vendor conveyed land receiving two negotiable notes for the unpaid purchase price, due at different dates, secured by mortgage on the premises conveyed. He assigned the note last maturing to an innocent purchaser, for value, before maturity, and transferred the other note to plaintiff after the maturity thereof. *Held*, that the vendee was entitled to set off against the non-negotiable note a sum that he had been compelled to pay in satisfaction of a preëxisting lien on the real estate conveyed.

From Howard Superior Court; *Hiram Brownlee*, Judge.

Action by Tamma Shelton against Phelan Wolf on a promissory note, and to foreclose a mortgage. From a judgment for plaintiff, defendant appeals. Transferred

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from Appellate Court, under §1837u Burns 1901. *Reversed.*

Charlton Bull and *B. C. Moon*, for appellant.

J. C. Herron, for appellee.

HADLEY, C. J.—The pleadings and special findings disclose in substance the following facts: In 1899 one Foreman sold and conveyed by warranty deed to appellant Wolf, certain real estate in Howard county, and took two notes from Wolf, both payable in a bank of this State, and secured by mortgage on the premises, for the unpaid purchase money,— one due May 1, 1900, and the other September 1, 1900. The note due May 1st is the one in controversy. After said note became due, Foreman, the payee, indorsed it for full value to the appellee Shelton. Before the second note became due Foreman indorsed it to Gunnel for value, the latter purchasing the same in good faith and without notice of any defense. Wolf, when he bought the land, and accepted the deed therefor, had notice of a valid vendor's lien thereon for \$64, and to save foreclosure paid off the same before Foreman, his warrantor, had assigned the note in suit to the appellee. Wolf paid to Gunnel the amount of the second note a week before it was due.

Foreclosure by the appellee as assignee of the first note, which he purchased after due. Answer of set-off for the amount defendant was compelled to pay in discharge of the vendor's lien. Reply admitting the payment by the defendant of the \$64 in discharge of the vendor's lien, but averring that the same should not be set off against the note in suit because the second note matured at a date subsequent to the maturity of the plaintiff's note, and was likewise given for purchase money of the mortgaged premises, and was by the defendant voluntarily paid before maturity to the assignee. Conclusions of law and decree of foreclosure in favor of the plaintiff, and against the appellant on his answer of set-off.

The question arising upon exception to the conclusions of law, and upon the demurrer to the second paragraph of reply, are the same, and present the only point we are called upon to decide. In a concrete form the question may be stated thus: Has the purchaser of real estate under a warranty deed the right to set off against his warrantor's assignee of a non-negotiable note given for unpaid purchase money, a sum that the purchaser has been compelled to pay to relieve his purchase from a preëxisting lien? In stating the question, we are mindful that appellant, the purchaser, gave two negotiable notes for unpaid purchase money, due at different dates, and both secured by mortgage on the premises conveyed. It is the succeeding facts that give character to the question involved.

Foreman, appellant's warrantor, for value, and before due, assigned the note last maturing to Gunnell, who had no notice of a defense. The assignment of this note to an innocent holder placed it beyond the reach of a defense in the hands of Wolf, the maker. Foreman kept the other note—the first one to fall due—and which was sufficient to pay the vendor's lien against which he had warranted,—kept it until it was past due, and until it had become dishonored and had lost its negotiable quality. Immediately before Foreman assigned the note sued on to appellee, the situation was that Wolf had outstanding two mortgage notes, one foreclosed as to defenses, and the other open to them. Under the law he, as maker, had rights as well as an assignee. The note went to appellee discredited upon its face by nonpayment at maturity. It was a broken contract when appellee purchased it, and he was bound to take notice of the defense, and to know that he would have no greater right to enforce payment than the payee had, and that it would be open to the same defenses in his hands that it would have been subject to if it had remained the property of the payee. Suppose Foreman had not assigned the note at all, and himself had brought this suit as plaintiff. It

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then becomes very clear that Wolf would have the right to recoup from the unpaid purchase money, as against his warrantor, whatever sum he had been compelled to pay to clear his title. *Watts v. Fletcher*, 107 Ind. 391; *Doss v. Ditmars*, 70 Ind. 451, 457; *Holman v. Creagmiles*, 14 Ind. 177. As we have seen, appellant had this same right against the appellee who purchased the note charged with notice that the maker had a defense against it. *Green v. Louthain*, 49 Ind. 139; *First Nat. Bank v. Henry*, 156 Ind. 1, and cases cited.

The mortgage does not affect the question we have, one way or another. It was a mere incident to the debt. The last note secured thereby had been paid by the maker to an innocent transferee, and was therefore out of the case. The other note secured thereby is owned, and is sued on by one who stands in the shoes of the payee and mortgagee, and the rights of the litigants, legal and equitable, must be determined as if no other person had been connected with the transaction.

The case of *Doss v. Ditmars*, *supra*, and other cases following it, are not analogous. In those cases the notes are all of the same class,—all alike open to defenses, and the parties all before the court.

Judgment reversed, with instructions to restate the conclusions of law and render judgment thereon in accordance with this opinion.

THE MCELWAIN-RICHARDS COMPANY v. GIFFORD
ET AL.

[No. 19,750. Filed December 9, 1902.]

MORTGAGES.—*Mortgage to Secure University Endowment Fund.*—*Sale by State Auditor.*—*Junior Mortgage.*—*Priority.*—A purchaser of land at a sale by the State Auditor to collect the amount of a loan represented by a State University endowment-fund mortgage, takes the land free from the lien of a junior mortgage. p. 537.

SAME.—*Sale by State Auditor.*—*Constitutional Law.*—The act of the legislature authorizing the State Auditor to collect the amount of

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a loan represented by a State University endowment-fund mortgage is not unconstitutional as conferring judicial power on the State Auditor. *p. 537.*

MORTGAGES.—*Sale to Collect Endowment Funds.*—*Junior Mortgagor no Right to Redeem.*—Where a sale of land has been made by the State Auditor to collect a mortgage loan of State University endowment funds, a junior mortgagor has no right to redeem. *p. 537.*

From Jasper Circuit Court; *S. P. Thompson*, Judge.

Suit by McElwaine-Richards Company against Benjamin J. Gifford and others. From a judgment for defendants, plaintiff appeals. *Affirmed.*

C. W. Hanley, J. J. Hunt and W. H. Latta, for appellant.

J. E. Wilson and B. F. Ferguson, for appellees.

JORDAN, J.— Action instituted below by appellant against appellees to foreclose a mortgage against certain described real estate situated in Jasper county, Indiana. A special finding of facts was made by the trial court, and conclusions of law thereon stated, upon which judgment, over appellant's exception, was rendered against it for costs.

The essential facts found by the trial court may be summarized as follows: On April 2, 1891, James Light was the owner in fee simple of the mortgaged real estate herein involved, and on that day he mortgaged the same to the State of Indiana to secure the payment of \$2,500 borrowed by him of the permanent endowment fund of the Indiana University. The mortgage and the note which it secured were in the prescribed statutory form. The money secured was to become due and payable on or before April 30, 1896, and the note executed by the borrower provided "that in case of a failure to pay any instalment of interest the principal sum shall become due and collectible, together with all arrears of interest," etc., "and the mortgaged premises may be forthwith sold by the auditor of public accounts for the payment of such principal sum, interest, damages, and costs." The mortgage was duly acknowledged and recorded

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as required by law. On the 15th day of May, 1891, Light sold and conveyed the mortgaged lands to one Smith, subject to the State's mortgage, and the payment of the amount secured thereby was assumed by said grantee as part of the purchase money. On June 1, 1892, Smith and wife mortgaged the premises to appellant to secure several promissory notes. This latter mortgage was duly recorded and is the one that appellant in this action is seeking to foreclose against appellees. Default having been made in the payment of interest on the loan made to Light, the Auditor of State, under the authority invested in him by the statute, after giving the required notice by publication, sold the premises on January 17, 1895, at public sale at the courthouse door in the city of Indianapolis, and appellee Benjamin J. Gifford purchased the entire tract for \$2,936.06, cash in hand paid, and on the same day the Governor and Secretary of State, in pursuance of law, conveyed by a proper deed the lands to said Gifford, and he thereupon took possession thereof. At the time Gifford purchased the lands, the court finds that they were wild, overflowed with water, and unfit for cultivation. The special finding discloses that all of the essential steps required by law were duly taken by the Auditor to warrant him to sell the lands in dispute. It is disclosed that at the time appellant obtained its mortgage it had actual notice of the one which Light had executed to the State. Gifford since purchasing these premises has paid taxes thereon to the amount of \$250, and has also paid drainage assessments to the amount of \$5,000, and has expended in other permanent improvements a like amount.

The conclusions of the court on the facts found were to the effect that the Auditor of State had legal authority to sell the realty in question as he did, and that Gifford, under the sale and conveyance made in pursuance thereof, acquired and took an absolute title in fee simple in and to the lands, and that all claims and rights of appellant under

its mortgage, as against said real estate in the hands of Gifford, were barred and foreclosed by virtue of said sale.

The principal question presented under the facts is: Did appellee Gifford, under the sale by the Auditor of State in satisfaction of the loan made to Light of the permanent endowment fund of the Indiana University, acquire and take title to the lands in dispute free from the lien of appellant's junior mortgage? This question is ruled by the decision of this court in the appeal of *Fisher v. Brower*, ante, 139, and, under the holding in that case the question must be answered in the affirmative.

The further contention is advanced by counsel for appellant to the effect that the Auditor of State should have foreclosed the State's mortgage by judicial proceedings, and that a construction of the statute which will sustain his act in the premises will render the law unconstitutional, for the reason that, under such circumstances, it may be said to confer judicial power upon the Auditor. There is no force or merit in this contention, and the question so raised is decided adversely to appellant's claim in the case of *Fisher v. Brower*, supra.

A further claim appears to be made to the effect that appellant's right to redeem the land from the State's mortgage could not be legally cut off or barred by the method employed by the Auditor in selling the land to satisfy the debt secured thereby. By the decision in the *Fisher* case, supra, the permanent endowment fund of the State University is, under the law, held and treated in like manner as is the common school fund. Therefore, Gifford, by his purchase at the sale in question, acquired an absolute title to the land; and appellant's right thereafter under its junior lien either to foreclose the same against the lands, or to redeem them from the sale made by the Auditor, was entirely barred and precluded. *Schnantz v. Schellhaus*, 37 Ind. 85; *Bonnell v. Ray*, 71 Ind. 141. The right to redeem from such sales is but a matter of grace which the legisla-

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ture does not appear to have extended to either the owner of the land or to a junior encumbrancer.

Other questions are discussed by counsel in respect to the sufficiency of the publication of the notice of the sale, and in regard to other minor points, all of which objections have been considered, but we find that they are not sustained by the facts and the law applicable thereto.

There is no error in the record, and the judgment is affirmed.

BROWN, ADMINISTRATOR, v. BERNHAMER ET AL.

[No. 19,974. Filed December 10, 1902.]

EXECUTORS AND ADMINISTRATORS.—Widow's Absolute Allowance.—Complaint.—Will as Exhibit.—The will of a husband devised to his widow such part of his estate as she might be entitled to under the statutes of descent in force at the time of his death. *Held*, in an action against the administrator with the will annexed, that it was not necessary that a copy of the will be filed with the complaint, since the action was under the statute, and not founded on the will. *p. 539.*

SAME.—Widow's Allowance.—Assignment.—Demand.—A demand made by a widow on the administrator of her husband's estate inures to the benefit of her assignee. *p. 539.*

APPEAL.—Misjoinder of Causes.—A judgment will not be reversed for a misjoinder of causes of action. *p. 540.*

EXECUTORS AND ADMINISTRATORS.—Widow's Allowance.—Action to Recover.—Interest.—Where an administrator upon demand refuses to pay the widow her statutory allowance of \$500, and she sues for the same, she is entitled to recover from the estate, in addition to her allowance, the interest thereon from the date of the administrator's refusal to pay. *p. 540.*

From Shelby Circuit Court; *Douglass Morris*, Judge.

Action by Julia F. Bernhamer and another against John H. Brown, administrator of the estate of Charles Bernhamer, deceased. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

F. J. Van Vorhis and *J. B. McFadden*, for appellant.
K. M. Hord and *E. K. Adams*, for appellees.

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DOWLING, J.—Charles Bernhamer died testate at Shelby county, in this State, seized of real and personal property of the value of \$8,000, leaving the appellee Julia F. Bernhamer his widow. By his will, which was duly admitted to probate, he directed that his widow take such part of his estate as she might be entitled to under the statutes in force at the time of his death, and nothing more. The appellant was duly appointed administrator of said estate, with the will annexed. The widow assigned her claim against the estate, to the extent of \$300, to her co-appellee. The administrator having refused to pay the allowance of \$500 to which the widow was entitled under the statute, she and her assignee joined in an action against said administrator for such allowance. Issues were formed, and upon the trial of the cause there was a finding and judgment for the appellees in the sum of \$545.66.

The errors assigned are upon the decisions of the court overruling a demurrer to the complaint for want of facts, and for a misjoinder of causes of action, and a motion to modify the judgment.

The first objection taken to the complaint is that no copy of the will was filed with it. There is nothing in the point. The claim of the widow was under the statute, and not upon the will. The devise to the widow, which gave her precisely the same estate that she would have taken under the statute, was void, and her title under the statute had precedence of the title by devise. *Davidson v. Koehler*, 76 Ind. 398; 4 Kent's Comm., 506.

The complaint contains a sufficient allegation that, at the time payment of the claim of the widow for the \$500 to which she was entitled under the statute was demanded, the administrator had in his hands funds sufficient to pay it. The demand made by the widow inured to the benefit of her assignee. *Walker v. Prather*, 3 Ind. 112; *Hamilton v. Matlock*, 22 Ind. 47; *Browning v. McCracken*, 97 Ind. 279; *Zeigler v. Mize*, 132 Ind. 403.

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The alleged misjoinder of the claims of the widow and her assignee in the complaint, even if erroneous, is not a ground for a reversal of the judgment. §§343, 344 Burns 1901, §§340, 341 R. S. 1881 and Horner 1901; *Coan v. Grimes*, 63 Ind. 21; *Cargar v. Fee*, 140 Ind. 572.

The court allowed interest upon the claim from the date of the refusal of the administrator to pay it, and rendered judgment for the same. A motion to modify the judgment by deducting the interest therefrom was overruled. The appellant insists that this was error, and that while the administrator himself might be chargeable with interest in an action on his bond for wrongfully refusing to pay the claim of the widow when he ought to have done so, the estate ought not to be punished for his default. We think the interest was properly included in the judgment. The claim of the widow was a preferred one, and was highly meritorious. §2424 Burns 1901, §2269 R. S. 1881 and Horner 1901; *Claypool v. Jaqua*, 135 Ind. 499. The statute made it the duty of the administrator to pay it out of the first moneys in his hands available for that purpose, if the estate was solvent. The suit was properly brought against him as administrator, with the will annexed, and the plaintiffs were entitled to full redress in that action.

It would not be just, nor in accordance with the principles of the civil code, to require them to bring two actions,—one for the statutory allowance against the estate, and another for damages against the administrator. *Case v. Case*, 51 Ind. 277; *Clark v. Helm*, 130 Ind. 117, 119, 14 L. R. A. 716. The estate need not be subjected to loss on account of the allowance of interest on the claim. Upon the presentation of the accounts of the administrator, the credit claimed by him for the interest paid may, if the court finds it proper to do so, be disallowed.

We find no error. Judgment affirmed.

THE CHICAGO AND SOUTH EASTERN RAILWAY
COMPANY v. WOODARD ET AL.

[No. 19,889. Filed December 11, 1902.]

APPEAL.—*Motion to Strike Out.*—*Review.*—A motion to strike out part of a complaint will not be reviewed on appeal, where it has not been made a part of the record by bill of exceptions or order of court. pp. 542, 543.

SAME.—*Motion to Strike Out.*—*Harmless Error.*—The ruling of a trial court denying a motion to strike out parts of a pleading, even if wrong, does not constitute reversible error. p. 543.

SAME.—*Joint Assignment of Error.*—A joint assignment that the court erred in overruling a demurrer to a complaint of several paragraphs is not available if any paragraph thereof is good. p. 543.

SAME.—*Bill of Exceptions.*—*Evidence not in Record.*—Where there was an attempt to incorporate the evidence in the record, under section six of the act of 1899 (Acts 1899, p. 384), which section pending the appeal, was held unconstitutional, and there had been no substantial compliance with the provisions of the previous act of 1897 (Acts 1897, p. 244), the evidence is not in the record. p. 544.

TENDER.—*Pending Suit to Foreclose Lien.*—*Attorney's Fees.*—*Interest.*—Where, on the day before the trial of a suit to foreclose a materialman's lien, the defendant tenders and pays into court the amount of the claim, including accrued costs, less attorney's fees and interest, such tender will not serve to exempt defendant from liability for attorney's fees and interest. pp. 544-549.

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Suit by John R. Woodard and others against the Chicago and South Eastern Railway Company. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

W. R. Crawford, *U. C. Stover* and *W. H. Najdowski*, for appellant.

F. E. Gavin, *T. P. Davis* and *J. L. Gavin*, for appellees.

JORDAN, J.—Appellant is a railroad corporation owning and operating a railroad running through the counties of Clay, Boone, Parke, Montgomery, Hamilton, Madison, and

Delaware, its eastern terminus being at the city of Muncie, in the latter county. Appellees are engaged in doing business as partners, and have instituted this action to recover a personal judgment for certain lumber, timber, and material furnished by them to appellant aggregating \$5,515.11, which it is claimed were used by it in the construction and repair of its railroad. The further relief sought is to foreclose a mechanic's lien against the road on account of the furnishing of the material in question. The trial court made a special finding of facts, and stated its conclusions of law thereon to the effect that appellees, plaintiffs below, were entitled to recover a personal judgment for a balance of their claim to the amount of \$705.28, including attorney's fees and interest, and to a foreclosure of their said lien; and, over appellant's exceptions to the conclusions, judgment was rendered for that sum, and a foreclosure of the lien decreed.

The errors assigned are that the court erred as follows: (1) In overruling appellant's motion to strike out parts of the complaint; (2) in overruling the demurrer to the complaint; (3) in its conclusion of law; and (4) in denying a motion for a new trial.

The complaint consists of twelve paragraphs, each of which, except the eleventh, seeks to recover a personal judgment, together with a decree foreclosing the mechanic's lien. The eleventh paragraph alleges that under a contract material had been sold and delivered to appellant which amounted to \$5,223.46, as shown by a bill of particulars filed therewith. A personal judgment is demanded, but no foreclosure of the lien. This paragraph also alleges the insolvency of the appellant, and as a further relief there is a prayer for the appointment of a receiver. Appellant unsuccessfully moved to strike out parts of the complaint, and then demurred separately and severally to each paragraph of the pleading on the ground that the court had no jurisdiction either over the person of the defendant or of the

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subject-matter of the action, and for insufficiency of facts as stated in each paragraph, and especially for the reason that neither stated facts sufficient to authorize a foreclosure of the lien in controversy. This demurrer was overruled, and exception reserved.

No question can be said to be presented for review in this appeal under the first assignment of error, because the motion and the ruling of the court thereon have not been made a part of the record by bill of exceptions or order of court. *City of Indianapolis v. Consumers Gas Trust Co.*, 140 Ind. 246; *Dudley v. Pigg*, 149 Ind. 363.

Again, if the motion and ruling of the court thereon were in the record, the alleged error would not be available, for it is settled that the ruling of a trial court in denying a motion to strike out parts of a pleading, even if wrong, does not constitute reversible error on appeal. *Walker v. Larkin*, 127 Ind. 100, and cases cited.

The second assignment is a general one,—that the court erred in overruling the demurrer to the complaint. The demurrer in question was addressed separately and severally to each of the twelve paragraphs of the complaint; hence, under this general assignment, appellant is not entitled to have this court review the sufficiency of each paragraph separately from the others, but thereunder we are only required to consider jointly all the paragraphs of the pleading as a whole; consequently, unless it appears that all are bad, appellant necessarily must fail under its second assignment. *Moore v. Morris*, 142 Ind. 354, and cases cited; Ewbank's Manual, §135.

It is not claimed that the eleventh paragraph, which only seeks a personal judgment and the appointment of a receiver, is bad. Therefore, as nothing is urged to the contrary, its sufficiency may be accepted as conceded by appellant. Upon another view appellant must fail under this assignment, for the reason that the several paragraphs may be said to be sufficient at least to entitle the plaintiff to re-

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cover a personal judgment, without regard to the question of their right to foreclose their alleged mechanic's lien, upon which ground counsel for appellant assail them in this appeal. Upon this latter view the error assigned would not be available. *Linder v. Smith*, 131 Ind. 147.

The questions involved under the motion for a new trial depend upon the evidence. An effort has been made, it seems, to bring the evidence into the record in accordance with the method prescribed by section six of the act of 1899. Acts 1899, p. 384. This section, however, was held invalid in *Adams v. State*, 156 Ind. 596, and as there has been no substantial compliance with the provisions of the act of 1897 (Acts 1897, p. 244), it follows that the evidence is not before us for consideration. *Klein v. State*, 157 Ind. 146; *Beall v. Union Traction Co.*, 157 Ind. 209; *City of Indianapolis v. Tansel*, 157 Ind. 463. In the absence of the evidence, we can not review any of the questions sought to be presented under the assignment that the court erred in overruling the motion for a new trial.

This action, as it appears, was commenced on June 27, 1899, and the special finding of facts, after stating that appellant is a railroad corporation owning and operating a railroad which extends from the city of Brazil, in Clay county, Indiana, into and through the counties of Parke, Hamilton, Boone, Madison, and Delaware of said State, to a distance of ninety miles, then proceeds to set forth other material facts substantially as follows: About the year 1893 appellant and appellees, the latter being partners, entered into a contract with each other, whereby the latter agreed to furnish to the former lumber and timber for use on its railroad in constructing station-houses, bridges, and other structures connected with its said road. Under this contract all material furnished and delivered to appellant by appellees prior to the last day of any month was to be paid for by appellant on or before the middle of the succeeding month. Under this contract appellees, during a

period of time which embraces several years, delivered to appellant for use, and which was used, on its railroad bed and in the construction of bridges, stations, trestlework, and other structures on and along its right of way, all of which formed a part of said railroad, and was connected therewith, a large amount of timber and lumber amounting to the sum of \$5,460.03. On November 4, 1898,—within sixty days from the date on which the last of said material was furnished by appellees to appellant,—the former filed in the recorder's office of each of the following counties, to wit, Hamilton, Madison, and Boone, a notice of their intention to hold a lien for the said material on appellant's right of way, bridges, trestlework, fences, and other structures connected with its railway, to secure a balance then due and unpaid to them on account of the lumber and material so furnished to appellant; the said balance amounting to \$3,344. This lien notice was, on the day on which it was filed, duly recorded in the recorder's office of each of the aforesaid counties. After November, 1898, appellees still continued to furnish and deliver material to appellant, which was used upon its railroad as aforesaid, and within sixty days after furnishing the last of said material appellees filed in the recorder's office of each of the following counties in the State of Indiana, to wit, Hamilton, Boone, and Madison, a notice of their intention to hold a lien on appellant's right of way, its bridges, and other structures connected with its railroad. The court further finds what is stated to be a correct statement showing the amount of material furnished by appellees to appellant between September, 1897, and April, 1899, which itemized amounts make up a total of \$5,460.03, the amount of money for material furnished, all of which was used by appellant on its road as previously stated, and which, as the court finds, is the same material mentioned and referred to in the written notice to hold a lien as hereinbefore stated.

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It further appears that each of the foregoing itemized amounts for material furnished became due and payable on and before the 25th day of the month next following the delivery of said material. It is also disclosed that partial payments have been made by appellant, which in the total amount to \$5,011.89. Itemized statements of the amount due were made out and presented by appellees for payment during a period extending from September, 1897, to April, 1899. The court finds that the payment of appellees' claim on the part of appellant was unnecessarily delayed; that under the contract and by reason of said delay appellees became entitled to interest on their said claim in the sum of \$210. By reason of appellant's failure to pay the indebtedness in question it became necessary for appellees to employ attorneys to enforce the collection thereof and the foreclosure of their lien, and it is found that a reasonable attorney's fee for services rendered for appellees in this action, by the attorneys which they had employed, is \$250. It is further disclosed or found that the remainder of the principal of the claim or indebtedness due and owing to appellees from appellant, after deducting all payments made thereon by appellant since the commencement of this action, is \$255.28, and that there is interest due on the principal amount of the claim in the sum of \$210. After the commencement of this action on the day before the beginning of the trial thereof, appellant tendered to appellees the said balance of \$255.28, together with the accrued costs to that date, in full payment and satisfaction of all matters and claims involved in this suit. This amount appellees refused to accept unless appellant, in addition thereto, would pay a reasonable attorney's fee for services rendered by appellees' attorneys in this action to enforce the collection of their debt and the foreclosure of their lien for the material furnished as aforesaid. Appellant refused to pay any attorney's fees, and thereupon paid the amount of its said

tender before the beginning of the trial, together with costs of suit to that date, to the clerk of the lower court.

The court finds that after appellees' aforesaid claims had been placed in the hands of their attorneys for collection, the first payment of \$1,000 was made by appellant thereon, and after this action had been commenced, and notice given that an application would be made for the appointment of a receiver, on the — of July, 1899, appellant paid to appellees' attorneys, on said claim, and in consideration that the application for a receiver would be postponed, the further sum of \$1,200. Appellant at the time of said claim had full knowledge that \$1,000 of the amount so paid was to be paid over to appellees on their claim, and that \$200 thereof was to be retained by the attorneys as part of their attorney's fees in the action, for which fees said attorneys at the time claimed that appellant was liable. After this cause had been set for trial on the application for the appointment of a receiver, the hearing thereof was again continued upon the payment of the last mentioned \$1,000. It further appears from the finding that there is now due and unpaid to appellees, including the amount of attorney's fees and the interest as hereinbefore stated, the sum total of \$705.28. The court further states in its finding that no part of the \$1,200 payment has been applied on attorney's fees, but all of said payment has been applied on the principal part of the indebtedness, and that from said amount of \$705.28, which amount appellees were entitled to recover, the \$255.28 paid by appellant to the clerk of the court had not been deducted.

Conclusions of law, as previously shown, are stated in favor of appellees that they are entitled to recover said sum of \$705.28, and to a decree foreclosing their said material lien.

That appellees were entitled to recover from the foregoing facts certainly can not be seriously controverted. The court, as disclosed, finds that the total amount due and un-

paid is \$705.28. This latter amount is made up by combining the balance of the principal sum due and unpaid with the amounts allowed for attorney's fees and interest, and judgment was rendered in favor of appellees for that amount, together with the foreclosure of the material lien. The contention of appellant's counsel seemingly is that appellees were neither entitled to recover attorney's fees nor interest, for the reason that after the commencement of the action, on the day preceding the beginning of the trial of the cause, \$255.28 was tendered in full payment and satisfaction of all the matters and items involved in the suit. The amount tendered neither included any attorney's fees nor interest, which the court finds appellees were entitled to be allowed. If the \$210, the amount which had accrued as interest, and the \$250 awarded as a reasonable attorney's fee be added to the \$255.28, the balance due on the principal, the total amount will be \$715.28,—\$10 in excess of the amount of the judgment rendered in favor of appellees. Surely, under the facts as found by the court, the tender made by appellant was not available to cut off the right of appellees to recover a reasonable attorney's fee, as authorized by §7267 Burns 1901. Upon no view of the case, under the circumstances, could the tender in question serve to exempt appellant from all liability in the action on account of interest and attorney's fees. It is shown that under the contract the money for the material furnished was to become due and payable on the middle of each succeeding month after the material was furnished to appellant. An itemized amount or bill for the material furnished and delivered to appellant was from time to time made out by appellees, and presented to appellant for payment; but, as the court finds, payment thereof was unnecessarily or unreasonably delayed. Under such circumstances appellees were entitled to be allowed and receive the legal rate of interest, as provided under §7045 Burns 1901. As a general rule, interest, in the absence of any agreement to the contrary, accrues on the

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principal from the time the latter is due and payable. *Mars-teller v. Crapp*, 62 Ind. 359; *Adams v. Fort Plain Bank*, 36 N. Y. 255, 261; *Sedgwick, Damages* (6th ed.), 463, 464.

If under the facts found appellees were not entitled to all of the relief awarded by the judgment below, as appellant insists, a motion by it to modify the judgment ought to have been made.

We find no available error, and the judgment is therefore affirmed.

INTERNATIONAL BUILDING AND LOAN ASSOCIATION
v. RADEBAUGH ET AL.

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[No. 19,487. Filed June 18, 1902. Rehearing denied December 11, 1902.]

BUILDING AND LOAN ASSOCIATIONS.—Premium.—A building and loan association can only require the payment of premium in gross, or instalments. It cannot require both. *p. 550.*

SAME.—Interest.—Premium.—Maturity of Stock.—A building and loan association contract provided that the stock should mature at the end of six and one-half years from the date of issue, or when the monthly dues paid and profits apportioned should amount to \$3,000, the face value thereof. The borrower received but \$2,700, the association retaining \$300 as a gross premium, and paid monthly dues, interest, and premium on the \$3,000 for six years and eight months. The dues paid amounted to \$1,560, and profits amounting to \$1,039.06 had been apportioned to the stock. *Held*, that the overpayment of interest and premium amounting to \$199.50, and the gross premium of \$300 retained, should be credited to the borrower's account, and when so credited the stock would amount to \$3,098.56. *pp. 550-552.*

From Blackford Circuit Court; *E. C. Vaughn*, Judge.

Action by the International Building and Loan Association against Jonas P. Radebaugh and others to foreclose a mortgage. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

W. N. Harding, A. R. Hovey and A. M. Waltz, for appellant.

J. A. Hindman and Maurice Powell, for appellees.

MONKS, J.—Appellant, a building and loan association organized under the laws of this State, sued appellees upon a contract for the payment of money, and to foreclose a mortgage on real estate given to secure said contract. A trial of said cause resulted in a judgment in favor of appellees. The contract and mortgage were executed May 28, 1891, to secure a loan of \$3,000 to a shareholder of appellant. Thirty shares of stock in appellant association were also assigned to appellant as collateral security for said loan. At the time the loan was made by appellant, the statute, §6, Acts 1885, p. 83, required the loans to be made to the members of the association in open meeting; the premium to be paid at one time or in instalments. In this case there was no bidding, but the loan was made, and the contract provided for the payment of a premium of five per cent. per annum on \$3,000, payable monthly. The borrower, however, received only \$2,700; \$300 being deducted and retained by appellant as a gross premium.

Appellant could only require a premium in gross, or in instalments. It had no power to require both. It is insisted, however, by appellant, that section nine of the act of 1897 (Acts 1897, p. 287, §4463i Burns 1901) legalizes contracts for the payment of premiums without bidding. It was so decided by this court in *International, etc., Assn. v. Wall*, 153 Ind. 554; but said section does not profess to legalize the taking of two premiums,—the one in gross, and the five per cent. per annum premium payable monthly.

This action was commenced January 19, 1899. The monthly dues on stock were paid for six years and eight months. The premium and interest were paid for six years and seven months. This, appellees insist, paid the loan under the terms of the contract. Appellant insists that

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notwithstanding its promise in the certificate of stock to pay \$100 for each share of stock at the end of six and one-half years, the other provisions therein, when construed therewith, show that the same does not mature until after the dues paid and the profits apportioned to each share of stock amount to \$100,—its face value,—although more than six and one-half years from the date thereof. It is not necessary to decide, and we do not decide, which of said theories is the correct one, for the reason that, even if appellant's theory is correct, the judgment rendered is not shown by the record to be erroneous.

The certificate of stock provided that appellant would pay \$100 for each of said thirty shares at the end of six and one-half years from May 1, 1891, the date of said certificate. Said certificate also provided that "at stated periods the profits arising from interest, premiums, fines, and other sources shall be apportioned among the shares in good standing, and whenever the monthly payments made on shares, together with the profits apportioned to such share, shall amount to \$100, such share shall be deemed to have been matured and no more monthly payments shall be required. No share of stock of this association shall be deemed to have matured until the sum of all payments thereon, together with the profits apportioned to said share, shall amount to the full sum of \$100."

There was evidence given at the trial that dues had been paid on said thirty shares of stock for eighty months, amounting to \$1,800, and that profits amounting to \$1,039.06 had been apportioned to said stock as provided in the certificate of stock. The amount of monthly payments of interest and premium for said seventy-nine months was \$1,975, while the amount of premium and interest on \$2,700,—the amount received by the borrower,—was only \$1,775.50, showing an overpayment of said interest and premium of \$199.50. Add said sum of \$199.50 and the \$300 gross premium retained by appellant to the dues

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paid and dividends declared, as above stated, and we have \$3,338.56, which is \$338.56 more than the amount required to mature said stock. Under such evidence this court can not say that the finding was contrary to law, or not sustained by sufficient evidence.

Judgment affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—Appellant insists that under its by-laws only sixty-five cents of the seventy-five cents paid monthly on each of said thirty shares of stock for eighty months should be credited to appellees as dues paid, and that counting the dues paid on this basis they amount to only \$1,560 instead of \$1,800.

Even if this insistence of appellant's is correct, a question we do not decide, it would not change the result. Taking \$1,560 as the amount of dues to which appellees were entitled to credit, and add thereto \$1,039.06, the profits apportioned to said stock, \$300 deducted from the loan and retained by appellant as a gross premium, and \$199.50 premium and interest paid on said \$300 not received, and we have \$3,098.56, being \$98.56 more than required to mature said stock.

The other questions presented in the petition for a rehearing were considered and determined in the original opinion.

The petition for a rehearing is denied.

RUSSELL V. BRUCE ET AL.

[No. 19,87C. Filed June 19, 1902. Rehearing denied December 12, 1902.]

MORTGAGES.—Foreclosure.—Rents During Year of Redemption.—Receivers.—The court rendering a decree of foreclosure is authorized by subdivision 4, §1236 Burns 1901, after the sale of the mortgaged property for less than the amount of the judgment, to appoint a receiver to collect and keep, for the further order of the court, the rents accruing during the year allowed for redemption, as against the owner of the property sold. *p. 555.*

SAME.—Foreclosure.—Rents During Year of Redemption.—Receivers.—A mortgagee who purchases the mortgaged property at foreclosure sale for less than the amount of his judgment is entitled to the rents accruing during the year of redemption, as against the owner, for application to the unpaid balance of his judgment. *pp. 555, 556.*

SAME.—Foreclosure.—Rents During Year of Redemption.—The fact that a mortgagee who purchased the property at a foreclosure sale for less than the amount of his judgment did not obtain a personal judgment against the owner of the land who had purchased it from the mortgagor, did not affect the right of the mortgagee to the rents of the land during the redemption period. *p. 556.*

SAME.—Foreclosure.—Rents During Year of Redemption.—Exemption.—Where a mortgage is foreclosed and the property sold to the mortgagee for less than the judgment, the owner of the property who purchased it from the mortgagor, and against whom no personal judgment was rendered, can not, as against the mortgagee, under the householder's exemption statute, claim the rents, during the year of redemption. *p. 557.*

From Marion Circuit Court; *H. C. Allen*, Judge.

Suit by Margaret Bruce against Isaac Russell and another to foreclose a mortgage. From a judgment for plaintiff, defendant Isaac Russell appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

T. E. Johnson and *D. A. Myers*, for appellant.

Woodburn Masson, *W. P. Reagan* and *H. C. Hendrickson*, for appellees.

Russell v. Bruce.

HADLEY, J.—Samuel Waters being the owner of real estate on June 25, 1897, mortgaged the same to Margaret Bruce, appellee, to secure a note for \$1,700. Subsequently, on July 1, 1898, Waters sold and conveyed the property by warranty deed to Isaac Russell, appellant. On July 27, 1899, default in payment having been made, Mrs. Bruce brought foreclosure against Waters and Russell, and on November 9, 1899, recovered a judgment for \$2,079, and decree of foreclosure, but took no personal judgment against Russell. At the sheriff's sale under the decree December 16, 1899, Mrs. Bruce purchased the property for about \$200 less than the amount due upon the judgment, and receipted the judgment by the amount of her bid. After the sheriff's sale, to wit, on December 30, 1899, the court, upon motion of Mrs. Bruce, and over the protest, objection, and exception of Russell, appointed a receiver "to take charge of said property during the year for redemption, collect the rents and profits, and apply the same as the court shall direct." The property was not redeemed from said sale. Russell continued the owner from his purchase from Waters until after the expiration of the year for redemption and held possession by a tenant, from whom he collected rents up to December 30, 1899, when he was ousted from collecting the rents by the appointment of the receiver. The rents accruing during the year for redemption, collected by the receiver, were not in excess of the amount required fully to pay the balance of the mortgage debt, principal and interest. At the close of the year, Russell, claiming to be entitled to the money collected by the receiver as the owner of the fee, petitioned the court, reciting the above facts, for an order upon the receiver to pay it to his use. Mrs. Bruce demurred to appellant's petition and filed a counter petition of her own, claiming to be entitled to said rents for application to the unpaid balance of her judgment. The court sustained appellee's demurrer, and

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ordered the money paid to her upon her counter petition, and Russell appeals.

Two questions are presented by the record: (1) Has the court which renders a decree of foreclosure after sale of the mortgaged premises for less than the amount of the judgment, authority to appoint a receiver to collect and keep, for the further order of the court, the rents accruing during the year allowed for redemption, as against the owner of the property sold? (2) Is the mortgage creditor, who is also the purchaser at the foreclosure sale for less than the amount of his judgment, entitled to the rents accruing during the year for redemption, as against the owner, for application to the unpaid balance of his judgment?

It should be regarded as settled in this State, since the statute of 1881 (§779 Burns 1901), that a purchaser at a general judgment or foreclosure sale in his relation as a purchaser, is not entitled to rents accruing for one year after his purchase. The owner of the real estate sold is entitled to the use and rents for that period, as an inseparable incident to his right of possession. *World Building, etc., Co. v. Marlin*, 151 Ind. 630, and cases cited.

But it is equally well settled that in foreclosure proceedings an insolvent mortgagor or owner who does not redeem, and who holds possession by a tenant, as in this case, during the year for redemption, is not entitled to the rents and issues of the property as against a mortgagee purchaser whose judgment is not wholly paid; and in such case a receiver of the rents may be appointed after the sale, or before, upon proof of inadequacy of the security, and insolvency of the debtor. §1236 Burns 1901, clauses 4, 6; *Merritt v. Gibson*, 129 Ind. 155, 15 L. R. A. 277; *Harris v. United States Savings, etc., Co.*, 146 Ind. 265, 269; *Sweet & Clark Co. v. Union Nat. Bank*, 149 Ind. 305; *World Building, etc., Co. v. Marlin*, *supra*.

In theory, a purchaser of real estate at sheriff's sale gets all he bargained for when he receives the deed and posses-

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sion at the end of a year. He bids on the property knowing that possession and enjoyment will be denied him for a year, and submits his bid upon his judgment of the present value of the estate, as affected by the postponed enjoyment. In such case the possession for a year is neither bid on, nor sold. So when he gets his money and interest back by redemption, or receives possession of the property purchased, in accordance with the terms of his contract, he is destitute of any legal or equitable claim for rent against any one. It is otherwise with a mortgagee who becomes the purchaser at his own foreclosure sale. A mortgage creating a lien on specific property for the payment of a particular debt or the performance of a particular duty is a matter of free contract. The law neither prohibits nor promotes; it authorizes. The contract of the mortgagor is to pay the debt on the terms specified, or surrender to the mortgagee the particular property, not reserving to himself any right therein, except to redeem within the period fixed by law. And when the mortgagor has made default, and the court has decreed a forfeiture of the pledge, such a decree carries with it, by virtue of the contract, a forfeiture by the mortgagor of the entire estate and all rights and incidents connected therewith except the right to redeem by making full payment of the secured debt within the statutory limit. The lien of the mortgage is not merged in the decree, nor discharged by the sale (*Merritt v. Gibson, supra*), but continues to operate upon the rents and profits for any unpaid balance until actual possession has been bestowed upon the mortgagee purchaser.

That no personal judgment against appellant accompanied the decree of foreclosure makes no difference. The absence of such judgment does not alter the force and effect of the judgment *in rem*, nor affect the continuing lien of the mortgage until possession was obtained by the purchaser.

Judgment affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—Appellant complains because we did not rule more directly upon his claim to the money in the hands of the receiver under the householder's exemption statute. §715 Burns 1901.

For reasons stated in the last page of the original opinion, appellant, under the facts of this case, is not entitled to the money in controversy under the exemption law. When the property was his own he was perfectly free to hold it, and reserve his householder's exemption therefrom, or sell it, or convey it by mortgage to secure an indebtedness. He exercised his privilege, and, to the extent of the debt secured, the execution and foreclosure of the mortgage was, as against his right of exemption, an alienation *pro tanto*, as effectual as a conveyance by deed. As against the mortgage debt he had no property or money to which his claim for exemption could attach. *Love v. Blair*, 72 Ind. 281; *Sullivan v. Winslow*, 22 Ind. 153; *Slaughter v. Detmeyer*, 15 Ind. 49.

Petition for rehearing overruled.

THE McELWAIN-RICHARDS COMPANY v. WALL.

[No. 19,854. Filed December 16, 1902.]

APPEAL.—*Failure of Appellee to File Brief.*—*Record.*—*Rules.*—In the absence of a brief by appellee, the Supreme Court, under its rule twenty-two, will treat as conclusive the statement in appellant's brief in reference to the record. pp. 558, 559.

PLEADING.—*Sufficiency.*—*Inferences.*—A court in dealing with evidence may be justified in drawing inferences from certain items of evidence, but where the question involved pertains to the sufficiency of a pleading, inferences will not be resorted to. p. 561.

NEGLIGENCE.—*Unsafe Working Place.*—*Complaint.*—*Inferences.*—In an action against an employer for personal injuries caused by the turning of a plate or chord in a partially constructed building on

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160	437
159	557
162	248
159	557
163	48
163	294
159	557
164	359
164	534
164	647
p164	660
159	557
165	300
165	672
159	557
166	299
167	85
168	660
159	557
169	680
170	378
159	557
171	313
171	651

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which plaintiff was working, the complaint must allege directly, and not by way of inference, the negligent construction of the plate. *p. 562.*

From Tipton Circuit Court; *W. W. Mount*, Judge.

Action by John Wall against the McElwaine-Richards Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1837u Burns 1901. *Reversed.*

E. E. Stevenson, George Shirts, W. R. Fertig, R. B. Beauchamp and *R. H. Proctor*, for appellant.

I. W. Christian, W. S. Christian and *E. E. Cloe*, for appellee.

JORDAN, J.—This action was instituted by appellee in the Hamilton Circuit Court, and thereafter venued to the Tipton Circuit Court. The purpose of the suit is to recover damages for personal injuries alleged to have been sustained by appellee while in the employ of appellant on October 21, 1899, at the city of Noblesville, on account of the turning of a chord of a truss upon which he was standing engaged at work at the time of the alleged accident. A trial resulted in appellee being awarded, by the general verdict of the jury, damages in the sum of \$3,000, and over appellant's motion for a new trial judgment was rendered thereon.

The errors assigned relate to the overruling of the demurrer to the complaint for insufficiency of facts, and in overruling the demurrer addressed to each of three paragraphs of the complaint on the ground that neither of said paragraphs stated a cause of action, and in denying the motion for a new trial.

We have not been favored with a brief on the part of appellee in this appeal. It appears, however, that after some twenty days or more beyond the time allowed under rule twenty-one pertaining to the Supreme and Appellate Courts for appellee to file a brief, he applied to the Appel-

late Court, wherein this cause was then pending, for an extension of time in which to file his brief. His application was denied by that court for the reason, we may presume, if for no other, that it had not been seasonably made. Therefore, in the absence of any brief on appellee's part, there is nothing to controvert or dispute the statement made by appellant's counsel in accordance with rule twenty-two, whereby they set forth such parts of the record which, as they claim, present the error or errors relied upon for a reversal. Under rule twenty-two this statement is required to be taken or accepted as accurate and sufficient for a full understanding of the questions presented for decision, "unless the opposite party in his brief shall make necessary corrections or additions." The evident purpose of rules twenty-two and twenty-three in requiring that the appellant and appellee shall make the respective statements therein mentioned, was to relieve the court of the labor of searching the record in order to ascertain whether the errors complained of are sustained thereby.

It will be observed that rule twenty-three exacts of the appellee the duty in his brief to point out any omissions or inaccuracies in the statement made by appellant in respect to the record. It is evident, therefore, that these respective rules subserve another important purpose in the furtherance of business pending in this court; that is, that all of the members thereof will be enabled to consider the errors involved through and by means of an examination of the respective briefs, without necessarily being required to resort to an inspection of the transcript. In the absence of a brief on appellee's part in this appeal, the statements made by appellant in his brief in respect to the complaint and other portions of the record stand undisputed, and we, in obedience to the rule in question, must treat and consider the same as accurate and true, and are not required to examine the record in order to discover if there are any omissions or inaccuracies in such statement; for this duty,

under the rule, is expressly imposed upon the appellee, and not on the court.

Appellant's statement of the record discloses that the first paragraph of the complaint alleges that the plaintiff was employed by the defendant as a common laborer to work on the building; that he was inexperienced, and not a skilled workman, and of this fact the defendant had knowledge; that on or about October 21, 1899, while the plaintiff was so employed about the building, defendant's superintendent "carelessly and negligently ordered him to climb upon a plate or chord constituting a part of the building,—which order plaintiff was bound to obey,—and to throw down some planks or boards; that the plaintiff did not assist in constructing the chord, and did not know how it was placed and held in position, and did not know how it should be held or fastened in position; that he did not know of the unsafe condition of said chord or plate, or that the same was not properly fastened and tied in position; that the defendant and its said superintendent knew at the time plaintiff was ordered upon said plate or chord to throw down said planks or boards that said plate or chord was not tied and fastened and was unsafe to go upon, and was liable to turn or fall when said boards or planks were thrown down, and to throw plaintiff off and fall upon and injure him," etc. After the averment of these facts it is alleged "that while plaintiff was in the performance of his work in throwing down said planks or boards, and while exercising due care and diligence, said plate or chord suddenly, without any warning whatever, turned and fell and threw plaintiff violently to the ground, thereby injuring him," etc. These are all of the facts, as we take them from the statement of appellant, which can be said to show that appellant, as the master, had violated some duty which he owed to appellee as its servant. When reduced to a simple proposition they may be said to show: (1) That appellee was an unskilled or inexperienced workman, of which fact

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appellant had knowledge; (2) that appellant's superintendent "carelessly and negligently" ordered appellee to climb upon a plate or chord constituting a part of the building to throw down some planks or boards, which order, as alleged, he was bound to obey; (3) that he did not know of the unsafe condition of the plate or chord; (4) that appellant and the superintendent did know that the chord or plate in question was unsafe. It will be observed that there is no direct or positive averment which discloses that the chord was in any manner unsafe or improperly constructed, or that the place where appellee was directed to go was one of danger; but the condition of the chord, to the turning of which the accident is attributed, is left wholly to inference or surmise. The bare averments that appellee was negligently ordered to go upon the chord or plate to throw down some boards, and that he did not know that the chord was unsafe, but that appellant was aware of that fact, are certainly not sufficient, under the circumstances, to charge appellant with actionable negligence. From the two facts, as averred, that appellee did not know that the chord was unsafe, but that appellant did know it was unsafe, the ultimate or issuable fact that the chord or plate in question was unsafe, is left to be inferred. The question with which we have to deal is not one in regard to evidence, but one which relates to pleading. While a court in dealing with evidence may be justified in drawing inferences from certain items of evidence, still it is not warranted in resorting to inferences or deductions where the question involved pertains to the sufficiency of pleading; for the rule recognized at common law and by our code affirms that material facts necessary to constitute a cause of action must be directly averred, and can not be left to depend upon or to be shown by mere recitals or inferences. *Avery v. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680; *Erwin v. Central Union Tel. Co.*, 148 Ind. 365, and cases cited.

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A plaintiff who seeks to recover on the ground of negligence, among other things, is required in his complaint sufficiently to allege actionable negligence on the part of the defendant. *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374, and cases cited.

It is evident that the pleading in question does not respond to the requirements of the rules which we assert, for there is an entire absence of any positive or direct charge to show that the chord of the truss which turned and threw appellee to the ground was unsafe or defective, or that the place to which he was directed to go and engage in throwing down boards was one of danger. The paragraph, at least for the reasons stated, was insufficient on demurrer. From the statements made by appellant's counsel, the second paragraph of complaint is open to the same objections imputed to the first, and at least for the same reasons is bad.

The judgment is therefore reversed, and the cause remanded to the lower court, with instructions to sustain the demurrer to the first and second paragraphs of the complaint, with leave to appellee, if requested, to amend his complaint.

DUDGEON v. BRONSON ET AL.

[No. 19,849. Filed October 15, 1902. Rehearing denied December 16, 1902.]

159	562
159	439

EASEMENTS.—*Private Road.*—*Way of Necessity.*—The fact that a way sixteen feet wide which has been recognized and in use for twenty-five years is so low and wet that plaintiff can not pass over the same without inconvenience and difficulty, does not entitle him to an increase in the width of the road. pp. 563-565.

APPEAL AND ERROR.—*Petition for Rehearing.*—*Court Can Not Extend Time for Filing.*—The court has no power to extend the time for filing a petition for a rehearing beyond the time fixed by §674 Burns 1901. p. 566.

From Allen Superior Court; *W. J. Vesey*, Judge.

Dudgeon v. Bronson.

Suit by Mary C. Bronson and husband against Charles H. Dudgeon for the extension of a private way. From a judgment for plaintiffs, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

Wilmer Leonard and Elmer Leonard, for appellant.
E. V. Harris, for appellees.

DOWLING, C. J.—Mary C. Bronson, the plaintiff below, with whom was joined her husband, sued the appellant for a way of necessity over lands owned by him. The court overruled a demurrer to the amended complaint. A special finding of facts was made, and conclusions of law were stated thereon. The appellant excepted to each conclusion. Motions for a new trial and for a *venire de novo* were also made and overruled. These decisions of the court are assigned for error.

The complaint shows that in 1875, one Stone owned two tracts of land in Allen county, one of which contained 160 acres, and the other forty acres. Stone sold the larger tract in 1875 to one Benninghoff, and in the same year conveyed the smaller to the appellee Mary C. Bronson. The 160 acre tract bordered upon a highway, but the forty acre tract had no outlet. The appellant is a remote grantee of Benninghoff. The successive owners of the larger tract have recognized the right of the appellee to a way over the same to the public highway, and such way is in use by the appellee, but, on account of the character of the location of the said way, which is low and wet for a large part of the year, and the nature of the soil, which is soft, the appellee can not pass over the said way without inconvenience and difficulty. In its present condition, the said way is useless to the appellee for ingress and egress to and from her land, and an additional strip four feet in width, running the whole length of said way, is required to render said way passable and useful. The appellant refused to let the ap-

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pellee use such additional strip, and has forbidden her to enter upon the same. The relief prayed for is that the width of the way be fixed at twenty feet.

The case stated in the complaint is one in which the appellee was originally entitled to a way of necessity. Stone owned both the outer and larger tract bordering on the highway, and the inner and smaller one which had no outlet. If the smaller tract was first sold, the right of access to the highway over the lands of the grantor was appurtenant to the grant. If the larger tract was first sold, then a way of necessity was impliedly reserved by the grantor for the benefit of the forty acre tract. But it appears from the complaint that, after the conveyance of the two tracts by Stone, a way, sixteen feet in width, was granted to and accepted and used by the appellee, and that she still continues to use it. She does not allege that she has no outlet from her land to the public highway, but says that the way,—which we must presume was agreed upon between the appellee and the appellant, or his grantors,—has become wet and inconvenient, and therefore useless. Having accepted a way of a certain width, and over a particular part of the lands owned by the party holding the servient estate, the appellee has no right to change it, but must be confined to the way thus selected. The grounds of the complaint are mere matters of inconvenience. That the way once selected and agreed upon is too steep, or too narrow, or too wet, does not entitle the appellee to demand a new way, or to increase the width, or change the direction of the old one. The right of way from necessity over the land of another is always of *strict necessity*, and nothing short of this will create the right.

It is said in *Ritchey v. Welsh*, 149 Ind. 214, 40 L. R. A. 101, that: "When the way is once selected it can not be changed by either party without the consent of the other." Citing *Nichols v. Luce*, 24 Pick. (Mass.) 102; *Holmes v. Seely*, 19 Wend. 507, 510; *Morris v. Edg-*

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ington, 3 Taunt. 23; Goddard, Law of Easements (Bennett's ed.), 351. See, also, 2 Washburn, Real Property (4th ed.), 306; Washburn, Easements and Serv. (4th ed.), 258, 263.

"The grantee is bound to keep the way in repair, and is not permitted to go *extra viam* as a traveler upon a *public highway* is allowed to do when the way is *impassable*, except, *it seems*, when the private way is *temporarily* or *accidentally* obstructed." *Holmes v. Seely, supra*.

"Where the right to an easement is granted without giving definite location and description to it, the exercise of the easement in a particular course or manner, with the consent of both parties, renders it fixed and certain, and the dominant owner has no right afterwards to make changes affecting its location, extent, or character." 10 Am. & Eng. Ency. Law (2d. ed.), 430, and cases cited in note 3.

The situation of the appellee is the same as if her deed from the owner of the servient tract had expressly granted and described a way sixteen feet wide from her forty acre lot over the 160 acre tract to the highway, along the route followed by the way she now owns. In that case she certainly could not have compelled the appellant to give her a new way, or to increase the width of the old one.

As it appears from the complaint that the appellee can get to her property from the highway over a way already belonging to her, and as that way must have been selected or agreed upon by her, no ground is shown for her claim to an additional strip as a way of necessity. The demurrer to the complaint should have been sustained. The other errors assigned need not be considered.

For the error of the court in overruling the demurrer to the complaint, the judgment is reversed, with directions to sustain the demurrer, and for further proceedings in accordance with this opinion.

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ON PETITION FOR REHEARING.

Per Curiam.—The court has no power to extend the time for filing a petition for a rehearing beyond the time fixed by §674 Burns 1901. Application for extension is therefore denied.

MARTIN ET AL. v. BERRY.

[No. 19,584. Filed October 16, 1902. Rehearing denied December 17, 1902.]

MECHANIC'S LIEN.—*Foreclosure.*—*Mortgages.*—Mortgagees who were not made parties to a suit to foreclose a mechanic's lien on the mortgaged premises may, after the expiration of the time given by §7259 Burns 1901, for the enforcement of mechanic's liens, enjoin a sale of the property under the decree foreclosing the lien. pp. 566-570.

JUDGMENT.—*Mechanic's Lien.*—*Mortgages.*—*Equity of Redemption.*—A personal judgment obtained by the holders of a mechanic's lien against the owners of the property, in a suit to foreclose the lien, created a lien on the owners' equity of redemption from a mortgage foreclosure sale of the property; and where the holders of the mechanic's lien were not made parties to the suit to foreclose the mortgage, such judgment lien was not cut off or barred by the decree rendered therein. p. 570.

From Huntington Circuit Court; *J. C. Branyan*, Judge.

Suit by William A. Berry against Marquis D. L. Martin and others to enjoin the sale of real estate under a mechanic's lien judgment. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1337u Burns 1901 *Affirmed.*

J. T. Alexander and *J. M. Hatfield*, for appellants.

B. M. Cobb and *C. W. Watkins*, for appellee.

JORDAN, J.—This action was instituted on January 28, 1899, by appellee to enjoin appellants, Marquis D. L. and Elmer B. Martin, together with Alonzo A. Crandal, sheriff of Huntington county, Indiana, from selling the north half of lot number sixty-two in the city of Huntington, county aforesaid, under a decree foreclosing a lien created under the mechanic's lien law for material furnished. A trial

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resulted in appellants being perpetually enjoined from selling said premises under the said decree. To reverse this judgment this appeal is prosecuted.

The facts material to the cardinal question involved herein, as the same are disclosed by the complaint, and under the special finding, are, in substance, as follows: In February, 1878, Jacob Wintrode, the owner thereof, sold and conveyed lot number sixty-two in the original plat of the city of Huntington to Elizabeth Hullibarger, Roxana Helser, and Mary E. Helser. Roxana and Mary E. Helser, under the provisions of the deed of conveyance, were invested with the fee simple of the said premises, and the said Elizabeth Hullibarger with the use thereof so long as she remained a widow. At the time of this conveyance by Wintrode, said grantees executed to him an indemnifying mortgage on the premises to save him harmless against any liability arising out of a certain mortgage. This latter mortgage was subsequently foreclosed, and Wintrode was compelled to pay the judgment rendered in the foreclosure proceedings, to the amount of \$262. On April 11, 1878, Roxana and Mary E. Helser, together with Andrew W. Helser, husband of Roxana, mortgaged said lot to John Skiles, to secure the payment of a note of \$100. This note and mortgage were subsequently assigned for value to one B. M. Cobb. In the summer of 1885 Roxana and Mary E. Helser, the owners in fee of said lot, made improvements on a house situated on the north half thereof; and in making the same they purchased material to the amount of \$103.69 from appellants Martin & Martin, and within sixty days after furnishing said material the latter filed a notice in the recorder's office of Huntington county, Indiana, of their intention to hold a lien on the north half of said lot for the amount of material so furnished, and on November 5, 1886, five days before the expiration of the year allowed by law for foreclosing said lien, Martin & Martin instituted an action in the Huntington Circuit

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Court against Roxana Helser and her said husband Andrew W. Helser, Elizabeth Hullibarger, and Mary E. Helser, who were the sole defendants in the action, to foreclose said lien, and on April 6, 1891, such proceedings were had therein that they recovered a personal judgment against Roxana and Mary E. Helser for \$135.80, together with costs, and a decree of foreclosure as against all of the defendants except Mrs. Hullibarger, who had died after the commencement of the action, and before the rendition of the final decree. This judgment has not been satisfied. On April 4, 1892, appellee, being the holder of each of the aforesaid mortgages, by virtue of assignments, commenced an action in the Huntington Circuit Court to foreclose the mortgage liens, making Roxana Helser, together with her husband, and Mary E. Helser, defendants to said action. Martin & Martin were not made parties thereto. The Helsers appeared in court, and filed an answer admitting the averments of the complaint; and such proceedings were had therein as resulted, on the said 4th day of April, in appellee recovering a judgment for \$974 against the Helsers, and a foreclosure of the mortgage against lot sixty-two. On May 7, 1892, said premises, under the latter foreclosure proceedings, were sold at sheriff's sale to appellee for \$900. Previous to April 4, 1892, the mortgaged premises had been sold for delinquent taxes, and appellee, by virtue of the tax certificates issued under the said sales, and assigned to him, procured the auditor of Huntington county to execute to him a tax deed for the lot in question, and at and prior to the commencement of this action he had taken possession thereof, and continued to hold the same. Before the beginning of this suit appellants Martin & Martin procured a certified copy of the judgment and decree rendered in the action wherein their mechanic's lien had been foreclosed, and caused said copy to be delivered to their co-appellant Crandal, sheriff of said county, and he, as such sheriff, advertised the north half of said lot

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sixty-two to be sold at sheriff's sale under and by virtue of said decree to satisfy the judgment rendered in favor of Martin & Martin, and would have proceeded to sell the premises in controversy, under said decree, had he not been prevented by the restraining order in this action. The court concluded, upon the facts found, that appellee was entitled to the injunction demanded, and rendered judgment accordingly.

The question presented under the law applicable to the facts is, was this judgment a correct result? Section 7259 Burns 1901, relating to mechanic's and material men's liens, provides that any person having such lien may enforce the same within one year from the time the notice of the lien was filed for record, or, if a credit be given, within a like period from the expiration of such credit. If not enforced, or, in other words, if an action to foreclose the lien is not commenced within the time prescribed by the statute, then in that event the law declares that the lien shall be null and void. A person holding a mortgage lien on the premises upon which there is a mechanic's lien must be made a party to the action to enforce the latter; otherwise his rights under his mortgage will not be affected by the judgment rendered therein. *Deming - Colborn Lumber Co. v. Union, etc., Assn.*, 151 Ind. 463; *Stoermer v. People's Savings Bank*, 152 Ind. 104; *Union, etc., Assn. v. Helberg*, 152 Ind. 139.

The facts disclose that the person or persons holding the mortgages, under which appellee claims, were not made parties by appellants Martin & Martin in their action to enforce their lien, nor were said appellants made parties by appellee to his foreclosure proceedings. Consequently, under the circumstances, neither of said parties was affected by the judgment rendered in the proceedings of the other. As the period of time prescribed for the enforcement of appellants' lien expired in November, 1886, such lien could not thereafter be enforced against any one, for, under the

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positive provision of the statute, it was declared null and void. In *Union, etc., Assn. v. Helberg*, 152 Ind. 139, it is held that this provision of the statute, declaring the lien under such circumstances to be null and void, is available in favor of all interested persons against whom proceedings have not been instituted within the limited period.

Under the law applicable to the facts, we are compelled to hold that appellants' attempt to procure a sale by the sheriff of the premises in dispute, under and by virtue of the order of sale obtained in their proceedings foreclosing their lien against the owners only, was illegal; hence the proposed sale was properly enjoined. As shown, appellants in their action foreclosing their lien recovered a personal judgment against Roxana and Mary E. Helser, the owners of the equity of redemption in and to the premises in controversy. This judgment itself created a lien on their equity of redemption, and, inasmuch as appellants were not parties to appellee's action to foreclose his mortgage, this judgment lien was not cut off or barred by the decree rendered therein. If appellants Martin & Martin at the commencement of the action herein had any enforceable right against appellee, it could be nothing more than the right to redeem the premises from the sale under and through which appellee claims to hold the realty, but in respect to this question we do not decide. See, however, *Union, etc., Assn. v. Helberg, supra*, and cases cited; *Holmes v. Bybee*, 34 Ind. 262; *Gaskill v. Viquesney*, 122 Ind. 244, 17 Am. St. 364. In fact, counsel for appellee say: "Martin & Martin may bring a suit to redeem, but before they can maintain such a lien they must pay the claims represented by the mortgages of Wintrobe and Skiles, and the \$130 due for taxes, with interest at the rate the claims would legally draw to the date of redemption."

Other rulings in the trial court are assailed as erroneous, but, even if this contention were true, the judgment of

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court, under the facts, is clearly right; hence such intervening errors, if any, may be dismissed as harmless.

The judgment is affirmed.

THE GREENFIELD LUMBER AND ICE COMPANY v.
PARKER ET AL.

[No. 19,983. Filed December 18, 1902.]

BONDS.—*Contracts for Construction of Schoolhouse.—Liability for Material Furnished.*—An agreement on the part of a contractor to provide material and labor, and construct a schoolhouse at his own cost, and that the school township should not be answerable or accountable therefor, is not the equivalent of a promise to pay the debts contracted for such purpose; and an action can not be maintained by a material man, on a bond given to secure the performance of such contract, for material furnished the contractor, and used in the construction of such building.

From Hancock Circuit Court; *J. E. McCullough*, Special Judge.

Action by the Greenfield Lumber and Ice Company against Clint Parker and others on a bond given to secure the performance of a contract to construct a schoolhouse. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

Ephraim Marsh and *W. W. Cook*, for appellant.

C. G. Offutt, *W. H. Martin*, *E. J. Binford* and *J. P. Walker*, for appellees.

MONKS, J.—This action was brought by appellant against appellees on a bond executed by appellee Clint Parker as principal, and his co-appellees as sureties, to secure the performance of a written contract of said Parker with Center school township, Hancock county, Indiana, for the construction, by said Parker, of a schoolhouse for said township. The purpose of the action was to recover judgment for material alleged to have been sold and delivered by appellant to said contractor for and used in the construc-

tion of said building. The said bond and contract were made a part of the complaint. It was alleged in the complaint that the schoolhouse was completed by said Parker, and that he had been paid in full therefor by the school township. The sureties on said bond filed a demurrer to the complaint for want of facts, and the same was sustained by the court. Appellant refusing to plead further, judgment was rendered in favor of said sureties. The errors assigned call in question the action of the court in sustaining said demurrer.

The particular clauses of the contract relied upon by appellant are the second and seventh, which are as follows: "(2) The contractor, at his own proper cost and charges, is to provide all manner of labor, materials, apparatus, scaffolding, utensils, and cartage of every description needful for the performance of the several works." "(7) The proprietor will not, in any manner, be answerable or accountable for any loss or damage that shall or may happen to said works, or any part or parts thereof, respectively, or for any materials or other things used and employed in finishing and completing the said works."

The bond provides that if the said Parker "shall duly perform said contract, and fulfill all the several stipulations provided therein, this obligation shall be void, but, if otherwise, to remain in full force and effect."

In determining the question presented, it is proper to keep in mind that sureties are favorites of the law, and are not bound beyond the strict terms of the engagement; that their liability is not to be extended by implication beyond the terms of their contract, which contract is said to be *strictissimi juris*. *City of Lafayette v. James*, 92 Ind. 240, 243, 244, 47 Am. Rep. 140, and cases cited; *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260; *Weir Plow Co. v. Walmsley*, 110 Ind. 242, 246; *Graeter v. DeWolf*, 112 Ind. 1, 2; *Hart v. State, ex rel.*, 120 Ind. 83, 86; *State*

v. *Flynn*, 157 Ind. 52, 55; *Dunlap v. Eden*, 15 Ind. App. 575, and cases cited.

There is no agreement in either the contract or the bond to pay appellant, or any other person, for material furnished or used in the construction of said schoolhouse. Under the rule above stated it is clear that unless the sureties agreed to be bound for debts due persons for furnishing material, there is no legal reason why they should be held liable in this action. *Hart v. State, ex rel., supra*.

The agreement on the part of the contractor to provide the material and labor and construct said schoolhouse at his own cost, and that the school township should not be answerable or accountable therefor, is not the equivalent of a promise to pay the debts contracted for such purpose. Whenever the same were provided by the contractor without making the school township "answerable or accountable" therefor, said stipulation was complied with, whether the contractor paid cash therefor or obtained the same on credit.

In *Hart v. State, ex rel., supra*, one Hays was awarded a contract for the construction of a free gravel road. He entered into a written contract with the engineer and superintendent of the road for the construction of certain sections of said gravel road, and executed his bond with his co-appellants as sureties. The condition of the bond was that Hays should construct the road according to the provisions of the contract. The action was by the assignee of claims for labor performed and material furnished in the construction of said road. It was averred in the complaint that it was intended that the bond should be conditioned for the payment of debts incurred by the contractor, or to persons furnishing labor and material in the construction of the road, but that by mistake of the scrivener who prepared the bond the condition for the payment of such claims was omitted. There was a prayer for the reformation of the bond by the addition of that condition. This court held

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that the evidence was not sufficient to authorize the reformation of the bond, and that the sureties were not liable for the claims sued upon, in the absence of an agreement that they were to be bound for the payment of said debts. The court said, at page 86: "As the instrument is written it simply obligates the sureties of the contractor to answer for his failure in his undertaking to construct and complete the sections of the road designated 'according to the provisions of the contract entered into with the engineer and superintendent.' We can not perceive any legal reason upon which the obligors can be held in this action without evidence that they agreed to be bound for debts due persons performing labor and furnishing material."

It is evident that appellant is not entitled to the benefit of the contract and bond, because not within the terms thereof. The failure of Parker, the contractor, to pay the claims sued upon, was not, therefore, a breach of said contract and bond.

In all the cases cited by appellant there was either in the bond or contract secured thereby a provision that the contractor would pay for the labor and material, or in such language that the same could only be complied with by paying for such labor and material; and whenever said provision was in the contract, and not in the bond, the bond, in express terms, secured the performance of the same. Such cases have, therefore, no application here.

Judgment affirmed.

THE BOARD OF COMMISSIONERS OF THE COUNTY
OF OWEN ET AL. v. SPANGLER ET AL.

[No. 19,788. Filed December 18, 1902.]

HIGHWAYS.—*Gravel-road Bonds.*—*Injunction.*—*Collateral Attack.*—A suit will lie to enjoin the issuing of gravel-road bonds and the levying and collecting of a tax for the payment thereof, where such issue of bonds, including bonds already issued, exceeds four per centum of the assessed taxable valuation of the property of the township in violation of the act of 1899 (Acts 1899, p. 26) pp. 578, 579.

CONSTITUTIONAL LAW.—*Local Laws.*—*Improvement of Highways.*—*Gravel-road Bonds.*—The act of March 4, 1899 (Acts 1899, p. 422), providing that the act of February 7, 1899 (Acts 1899, p. 26), limiting the issuing of bonds for the improvement of highways shall not apply to counties having a population between 15,000 and 15,050 as shown by the census of 1890, is local, and violative of §22, of article 4, of the Constitution, which provides that the General Assembly shall not pass local or special laws "For laying out, opening, and working on highways. * * * For the assessment and collection of taxes for * * * road purposes." pp. 579-582.

SAME.—*Local Laws.*—*Improvement of Highways.*—*Gravel-road Bonds.*—The act of March 9, 1901 (Acts 1901, p. 283), to legalize the proceedings of the board of commissioners of Owen county relative to the construction of gravel or macadamized roads, being special and local, is unconstitutional. p. 582.

INJUNCTION.—*No Adequate Remedy at Law.*—*Taxation.*—*Gravel Roads.*—An order of the board of commissioners levying a special tax for the payment of bonds for the construction of gravel roads is an administrative act, from which no appeal will lie, and an aggrieved taxpayer, having no adequate remedy at law, is entitled to the remedy of injunction. pp. 582, 583.

PARTIES.—*Action to Enjoin County Commissioners.*—*Taxation.*—*Gravel Roads.*—Suit may be maintained by any interested taxpayer to enjoin the issuing of bonds and the levying and collecting of a tax for the payment thereof in violation of the act of 1899 (Acts 1899, p. 26). pp. 583, 584.

From Owen Circuit Court; *J. R. Miller*, Special Judge.

Suit by John Spangler and others to enjoin the board of commissioners of Owen county from issuing gravel-road bonds, and levying and collecting a tax for the pay-

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ment thereof. From a judgment for plaintiffs, defendant appeals. *Affirmed.*

Willis Hickam, D. E. Beem and J. C. Robinson, for appellant.

I. H. Fowler, T. G. Spangler and G. W. Grubbs, for appellees.

GILLET, J.—Appellees, who were the plaintiffs below, commenced this action on October 14, 1901, to enjoin the issuing of the series of bonds hereinafter referred to, and to enjoin the levying and collection of a tax for the payment of said bonds. A demurrer was filed to the complaint. The demurrer was overruled, and appellants excepted, and, electing to abide their demurrer, they refused to plead further. From a decree granting appellees the relief sought, appellants appeal to this court. An assignment of error presents the question as to the sufficiency of the complaint.

The complaint discloses that on January 25, 1899, a proceeding was instituted before the board of commissioners of said county, under Acts 1893, p. 196, as amended by Acts 1895, p. 143, for the improvement of certain highways in Marion township, Owen county, "by laying out, changing, locating, grading, macadamizing or graveling the same." The proceedings that followed were regular, down to the letting of the contract. The contract was let on May 27, 1899, at a sum in excess of four *per centum* of the total assessed taxable valuation of all of the property of said township, and the bonds above referred to, which equaled in amount such contract price, were ordered issued and sold to pay the cost of said improvement. The further allegations of the complaint need not be stated, as but two questions are argued, and they are as to the authority to negotiate said bonds, and as to whether there was a remedy by appeal that appellees ought to have pursued.

On February 7, 1899, an act entitled "An act to limit the issue of bonds or other evidence of indebtedness for the

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construction of free gravel or macadamized roads and declaring an emergency" (Acts 1899, p. 26), became a law. Section one of that act, omitting the enacting clause, is as follows: "That it shall be unlawful for any board of county commissioners to issue bonds or any other evidence of indebtedness payable by taxation, for the construction of free gravel, or macadamized roads, when the total issue for that purpose, including bonds already issued and to be issued, is in excess of four *per centum* of the total assessed taxable valuation of the property of the township or townships wherein such roads are located or to be located, and all bonds or obligations issued in violation of this act shall be void." March 4, 1899, the General Assembly passed a further act, with an emergency clause, by which it was provided that said last mentioned act "shall not in any manner apply to or affect the construction of free gravel or macadamized roads and the issue and sale of bonds therefor in cases where petitions have been filed or surveys and estimates have been ordered for the construction of free gravel or macadamized roads prior to February 27, 1899, and where the bonds for the construction of any such roads have not been issued or sold, prior to the 27th day of February, 1899, in counties where by the United States census of 1890 the population is shown to be between 15,000 and 15,050." Acts 1899, p. 422. In 1901 the General Assembly passed a curative act, solely applicable to the proceedings here in question, by which all of said proceedings and said bonds were declared validated. Acts 1901, p. 283.

We will first consider the question as to the effect of the order for the issue of bonds, apart from any question as to the validity of the two acts last above mentioned. Appellants' counsel contend that as the board of commissioners was constituted a special tribunal to act upon petitions to improve township highways, said board acted in a *quasi* judicial capacity, and that therefore its authority in the

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premises, as against this collateral attack, was as abundant to decide wrong as to decide right. The claim that this doctrine is applicable to the case before us can not receive our assent. As shown, the statute makes it unlawful for boards of commissioners to issue bonds for such purposes when the total issue of such bonds, including bonds already issued, exceeds four *per centum* of the assessed taxable valuation of the property of the township, and the statute then provides that "all bonds or obligations issued in violation of this act shall be void." The township is a governmental subdivision of the State, and subject to the control of the General Assembly, and the board of commissioners is constituted as a special agency to provide for the making of such improvements, and to raise the money to pay for the same. When, therefore, it is provided by law that it shall be unlawful to issue bonds or other evidences of indebtedness under certain circumstances, and that bonds and obligations issued in violation of such law shall be void, we must regard the case as one where an authorized principal has not only limited the authority of the agent, but, further, as a case where such principal, being a lawmaking power, has by its fiat definitely fixed the consequences which shall attend upon a violation of its command. The sole question, therefore, is, what is the will of such principal, as expressed in the statute? The act of February 7, 1899, stands as a declaration that it is against public policy to permit the incurring of an indebtedness in such cases greater than the statute authorizes, and the attached provision as to the effect of a violation of the legislative prohibition should be construed liberally to advance the remedy. The rules of construction will not authorize us to add to the unequivocal provision that bonds or other evidences of indebtedness issued in violation of the act shall be void the words "except on collateral attack." In view of the statute, it must be said that there was an implied withdrawal of power from the tribunal to enter the order under such circumstances.

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The case bears an analogy to cases where courts of general jurisdiction are denied the authority to enter a particular judgment. We recognize the extent that this court has gone in upholding the proceedings of special tribunals against collateral attacks, but we feel that a ruling on our part maintaining the validity of bonds or obligations that the statute has declared to be void, because of the effect of an exercise of jurisdiction, would be not only a step in advance of our former rulings, but a step that, if taken, would lead to the disregard and nullification not only of statutory but even of constitutional inhibitions against the incurring of indebtedness by public corporations in excess of prescribed limits. Such a prohibition means no less than its language imports, and we must therefore hold that unless the statute of February 7, 1899, was modified in its operation by subsequent acts, there was no power in the board of commissioners to issue the bonds in question.

We proceed to consider whether the act of March 4, 1899, had the effect to authorize the subsequent action of the board of commissioners in ordering said bonds issued. This court takes judicial notice of the population of the counties of this State according to the federal census of 1890. It is, therefore, advised that the only county in this State that had a population between 15,000 and 15,050, according to the federal census of 1890, was Owen county. As the population referred to in said act was to be determined according to a particular past census, so that other counties could not subsequently enter the class, it is apparent that by said act the General Assembly, in effect, sought to provide that the provisions of the general act of February 27, 1899, should not apply to certain described proceedings to improve gravel roads in the county of Owen. *City of Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337. As we read said act of March 4, 1899, it did not purport simply to except proceedings in the described county from the operation of the act of February 7, 1899, that were pending on February 7,

1899; but as the particular proceeding was then pending, we may assume that at least a part of the intended operation of the act of March 4, 1899, was so to restrict the earlier act that it would not apply to the then pending proceeding that we are called upon to consider. The act of March 4, 1899, was clearly local in its application to proceedings in Owen county that may have been commenced subsequent to February 7, 1899, and prior to March 4, 1899. It is not material, however, as respects the local character of the act of March 4, 1899, that the proceeding under which the bonds in question were ordered issued was pending on and prior to February 7, 1899, so that it could be said that the act of March 4, 1899, was in its operation an act to exclude from the operation of the act of February 7, 1899, pending proceedings in Owen county, for the validity of such legislation can not be affirmed unless we are able to affirm that it would have been competent to have provided, as a part of the general act of February 7, 1899, that said act should not apply to gravel road proceedings then pending in Owen county. This we are unable to do.

Section 22, of article 4, of the Constitution of Indiana provides that "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * For laying out, opening, and working on, highways, * * * For the assessment and collection of taxes for * * * road purposes." The proceeding that was sought to be excepted was a proceeding, according to the averments of the complaint, for the laying out and opening of a highway, if not for a "working on" the same, and the proceeding so sought to be excepted also involved and required the assessment and collection of taxes for road purposes. It is not necessary that the act should impinge upon the Constitution in the particular of authorizing an issue of bonds to render an issue of bonds invalid. If there was no authority to enter into the contract for the improvement, because the cost thereof was in excess of four *per centum*

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of the taxable valuation of the township, and if there was no authority to lay and collect the tax necessary to retire the bonds, because such tax would be laid by virtue of a local law "for the assessment and collection of taxes for * * * road purposes," we think that appellees were entitled to enjoin the negotiation of bonds based on such proposed tax levy. The attempted exclusion of pending proceedings for the improvement of gravel roads in Owen county from the operation of the general law prohibiting an issue of bonds for gravel road purposes in excess of four *per centum* of the taxable valuation of property of the township, was in effect an attempt to provide by a local law not alone for an issue of bonds, but for the levy of a tax that, under existing law, constitutes the means of retiring such bonds. We think that it was not competent for the General Assembly to make such exception. The act of March 4, 1899, does not purport to be a curative act, and it is not curative in the sense of attempting to validate a past proceeding, but we think that its validity is to be tested by the considerations that are applicable to statutes that purport to be curative. In cases where it would have been originally competent for the General Assembly to have authorized particular proceedings upon the part of a board or other official, the same source of power may ordinarily validate the proceedings; but unless the General Assembly had the power to have authorized the proceedings originally by an act that in its substance would have been of the same character as the curative act, then the curative act would be invalid. *Walsh v. State, ex rel.*, 142 Ind. 357, 33 L. R. A. 392; *Schneck v. City of Jeffersonville*, 152 Ind. 204.

The act of February 7, 1899, was general in its character, and if it had contained an exception that excluded from its operation proceedings generally that were then pending, we take it that it would not have thereby lost its general character. It can not, however, be contended with any show of reason that it would have been competent to have limited

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said act so as to exclude from its operation proceedings to improve highways in Owen county, thereby legislating for Owen county in such particular. This is in substance what it was sought to do by the act of March 4, 1899. As the subject of the legislation falls within §22, of article 4, of the State Constitution, we hold that the proceedings could not be validated by any act that could properly be characterized as local or special.

The act of 1901 is also invalid. The attempts to validate the contract and the assessment of taxes to pay the bonds upon their maturity were abortive, because of the special and local character of the act; and as it is not to be presumed that the issue of bonds would have been declared validated by the General Assembly, had it been advised that there was no power to retire such bonds in the manner proposed, the entire act must be regarded as a nullity. *State, ex rel., v. Denny*, 118 Ind. 449, 475, 4 L. R. A. 65; *State, ex rel., v. Fox*, 158 Ind. 126, 56 L. R. A. 893.

It is proper to say that it is not claimed by counsel that any other legalizing act applies to this case, and therefore we have given no consideration to such acts.

Under the general statute concerning appeals from boards of commissioners, §7859 Burns 1901, there is a right of appeal from decisions of such boards that are judicial in their character. *Board, etc., v. Davis*, 136 Ind. 503, 22 L. R. A. 515; *Board, etc., v. Heaston*, 144 Ind. 583, 55 Am. St. 192; *Board, etc., v. Conner*, 155 Ind. 484. If, however, as said in the case last cited, "the decision is made in the exercise of merely administrative, ministerial or discretionary powers, no appeal lies therefrom unless the statute in express terms authorizes an appeal from such decision." We recognize the fact that in the establishment of gravel roads there are certain questions that confront boards of commissioners that are judicial in their character, but we think that ordering an assessment of taxes to meet the cost of such an improvement is in the nature of an administrative act,

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and that therefore an appeal will not lie therefrom under said statute. If the law had provided that the township trustee should levy taxes to retire the bonds, there would have been no room for the claim that his act was judicial; and the fact that within the general framework of the legislation as to the duties of boards of commissioners in building gravel roads we find that they are given administrative duties, is no reason why such duties should be held to partake of the judicial character of their other duties in such connection. In ordering an assessment of taxes no question is involved as to the regularity of the proceeding, or as to whether the road should or should not be improved as prayed, because those matters have been presumptively determined by the proceedings of the board in advance of the order for the assessment, and therefore such order is simply one of administrative detail.

In view of the fact that the appellees could not have appealed from the order levying a special tax to pay the bonds, we think that they were entitled to the remedy of injunction. There was wanting an adequate remedy at law. It is unnecessary to decide whether the fact that the bonds were void gave a right to attack them by injunction, independent of any right of appeal. Whether the order for the issuing of bonds is also administrative in its general character is a question that has been argued, but inasmuch as appellants' counsel contend that under the statute the board is required, before ordering an issue of bonds, to hear evidence or make inquiry as to the assessed value of property in the township, and as to the extent of outstanding bonds,—matters that go to the root of the right to proceed,—we have deemed it best not to decide such question. It is enough to affirm concerning the bonds that the tribunal was prohibited from issuing them.

It is objected that the complaint proceeds on the theory that appellees were entitled to enjoin the issue of bonds on behalf of the taxpayers generally, and that their rights are

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several. When bonds are void and open to the collateral attack of all, we think that any interested taxpayer is entitled to secure a decree prohibiting their negotiation.

Judgment affirmed.

RAGLE v. MATTOX.

[No. 19,981. Filed December 19, 1902.]

INTOXICATING LIQUORS.—Remonstrance.—Power of Attorney.—A remonstrance by power of attorney against the granting of a license to sell intoxicating liquors is not invalid because the power of attorney does not contain the name of any applicant, but is general and directed against all applicants for license.

From Sullivan Circuit Court; *O. B. Harris*, Judge.

From a judgment of the circuit court reversing the action of the board of commissioners in refusing to grant to Alonzo Mattox a license to sell intoxicating liquors, John Ragle, remonstrator, appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

J. T. Hays, *W. R. Nesbit* and *W. H. Hays*, for appellant.

A. D. Leach, for appellee.

DOWLING, J.—The appellee filed with the board of commissioners of Sullivan county his application for a license to sell spirituous, vinous, malt, and other intoxicating liquors at retail, under the act of March 11, 1895 (Acts 1895, p. 248, §§7283a-7283k Burns 1901). At the proper time the appellant appeared and filed a remonstrance against the granting of such license, signed by himself, and also by a majority of the voters of the township in which the premises of the petitioner were situated, all of whose names had been subscribed by the appellant as the attorney in fact of such remonstrants. The board of commissioners sustained the remonstrance, and refused to grant the applicant a license. An appeal was taken by the appellee to the circuit court, and upon a trial of the cause there was a special finding

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with conclusions of law thereon, and a judgment in favor of the appellee.

The conclusions of law were as follows: "(1) That the said remonstrance is invalid and void, and said remonstrance should be dismissed; (2) that said Alonzo Mattox is entitled to receive a license, and a license should be granted to him to sell intoxicating liquors, of the kind and in the premises specified in his application, in Jackson township, Sullivan county, Indiana." The errors assigned are upon the conclusions of law.

The contention of the appellee is that the appellant had no authority to sign the names of the remonstrants to the paper filed with the board, for the reason that the power of attorney, under which he claimed to act, did not contain the name of the appellee, but was general in its character, and directed against all applicants for license. So much of the power of attorney as is involved in this controversy is in these words: "We, the undersigned, residents and voters of Jackson township, in Sullivan county, State of Indiana, do hereby respectively authorize John Ragle and Albert J. Zink, or either of them, to sign our respective names to any and all remonstrance or remonstrances against persons who may give notice of intention to apply for license to sell intoxicating liquors in said township, and hereby give such authority and sanction to said signing the same as if respectively signed by us, and also authorize them to properly file and present such remonstrance to the board of commissioners of said county."

The questions presented and argued here on behalf of the appellee have very recently been decided by this court in two cases, and in each adversely to the views of the appellee. In *Ludwig v. Cory*, 158 Ind. 582, it was held that a remonstrance signed by an attorney in fact under a power of attorney,—substantially the same as that before us,—was legal and effectual to bar the application for license.

The same ruling was subsequently made in *Boomershine v. Uline*, ante, 500.

Upon the authority of these cases, we hold that the court erred in each of its conclusions of law, and for these errors the judgment is reversed, with instructions to the court to restate its conclusions of law in accordance with this opinion, and to render judgment thereon in favor of the appellant.

THE STATE v. HINDMAN ET AL.

[No. 19,694. Filed January 7, 1903.]

JUDGMENT.—*Collateral Attack*.—*Recognizance*.—*Forfeiture*.—An answer to a complaint in an action upon a recognizance taken by a justice of the peace alleging that defendant was not called at any term of the court, and that no forfeiture of his recognizance was taken, but that after the final adjournment of the court, said court was irregularly convened in the night-time, and that defendant was then called and a forfeiture was taken, constituted a collateral attack upon the action of the court, and was bad against a demurrer, where it did not appear from the complaint or answer that there was anything in the record indicating that the forfeiture was not regularly taken at the proper time. pp. 587-591.

SAME.—*Collateral Attack*.—A cross-complaint in an action on a forfeited recognizance alleging that the judicial proceeding upon which the principal action was in part founded was void for fraud, because in fact taken in vacation, although purporting to have been taken in term, is a direct and not a collateral attack upon the proceedings of the court. *Harman v. Moore*, 112 Ind. 221 and *Cully v. Shirk*, 181 Ind. 76, disapproved. pp. 591, 592.

APPEAL AND ERROR.—*Harmless Error*.—Overruling a demurrer to a bad answer was harmless, where all the facts which could have been given in evidence under it were admissible under the cross-complaint. p. 592.

JUDGMENT.—*Impeachment*.—*Former Judge as Witness*.—*Competency*.—In an action on a forfeited recognizance bond, a former judge of the court, who directed the forfeiture to be entered, was a competent witness to establish the fact that the forfeiture was taken after the final adjournment of the court. p. 593.

From Greene Circuit Court; A. G. Cavins, Special Judge.

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Action by the State against Charles Hindman and another on a recognizance bond. From a judgment for defendants, the State appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

E. W. McIntosh, T. E. Slinkard, W. L. Taylor, Attorney-General, Merrill Moores and C. C. Hadley, for State. Seymour Riddle, for appellees.

DOWLING, J.—Action upon a recognizance, taken by a justice of the peace, the condition of which was that the appellee Charles Hindman should appear before the Greene Circuit Court on the first day of its next term to answer a charge of petit larceny, and abide the judgment of the court. The complaint alleged a breach of the bond, in that the appellee failed to appear. In addition to the general denial, the appellees filed a special plea alleging that the said Charles Hindman was not called at any term of the court, and that no forfeiture of his recognizance was taken; but that after the final adjournment of the court said court was irregularly reconvened in the night-time, and that the appellee was then called and a forfeiture taken. A cross-complaint stating the same facts was filed by the appellees, and a vacation of the order of forfeiture was demanded. Reply in denial of second paragraph of answer. A motion to strike out the cross-complaint and a demurrer to that pleading were overruled. Special reply to second paragraph of answer, alleging that after the adjournment of the Greene Circuit Court, it was regularly reconvened, and the appellee Charles Hindman called and defaulted. A second paragraph of answer to the cross-complaint was filed, alleging the same facts stated in the special reply. Demurrers to the second paragraph of appellant's reply to the second paragraph of appellees' answer, and to the second paragraph of appellant's answer to the cross-complaint, were sustained. A trial by a jury resulted in a verdict for the appellees, and, over a motion for a new trial, judgment was rendered on the verdict.

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The questions presented are: (1) Whether a defendant in an action upon a recognizance, alleged to have been forfeited, may show by way of defense that the supposed forfeiture was not in fact taken during the term at which the defendant was recognized to appear, but after the final adjournment, and in vacation; and (2) if these facts are not available by way of answer because a collateral attack upon the proceedings of the court as they appear of record, whether they may be taken advantage of by cross-complaint or counterclaim.

The liability of the principal and his sureties upon a recognizance in a criminal case is made to depend upon the neglect of the defendant, without sufficient excuse, to appear for trial or judgment, or upon any other occasion when his presence may be lawfully required according to the condition of his bond. On such failure to appear, the statute provides that the court shall direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited. As soon as the fact of such forfeiture is entered, the prosecuting attorney must proceed against the bail upon the recognizance. §§1790, 1791 Burns 1901, §§1721, 1722 R. S. 1881 and Horner 1901.

Until a forfeiture is taken by the proper court, no action can be maintained upon the recognizance, and the fact of such forfeiture must be alleged in the complaint. *Patterson v. State*, 12 Ind. 86; *Votaw v. State*, 12 Ind. 497; *Kiser v. State*, 13 Ind. 80; *Hawkins v. State, ex rel.*, 24 Ind. 288; *Gachenheimer v. State*, 28 Ind. 91; *Hannum v. State*, 38 Ind. 32; *Friedline v. State*, 93 Ind. 366; *Rubush v. State*, 112 Ind. 107; *McGuire v. State*, 124 Ind. 536. And such forfeiture must be taken at the term at which the defendant is required by his recognizance to appear. It can not be taken at a subsequent term. *Kiser v. State*, 13 Ind. 80.

It appears from the answer and the cross-complaint not only that no forfeiture was taken during the term specified in the recognizance, but that the supposed forfeiture

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was taken in vacation. The calling of the defendant, and, upon his neglect to appear, the forfeiture of his recognizance, were judicial acts which could be performed in term time only. If anything in the record disclosed that such acts were done in vacation, the proceeding would be void. *Newman v. Hammond*, 46 Ind. 119; *Davis v. Fish*, 1 G. Greene (Iowa) 406, 48 Am. Dec. 387; *In re Terrill*, 52 Kan. 29, 34 Pac. 457, 39 Am. St. 327.

But it did not appear from the complaint, nor was it alleged in the answer, that there was anything in the record indicating that the forfeiture was not regularly taken at the proper time during the term, and while the court was in session. This being so, the action of the court was not subject to collateral attack, and an attempt by answer setting up fraud, mistake, or any other matter outside the record, to impeach or evade such action was such attack, and the demurrer to the answer should have been sustained. *Oster v. Broe*, 160 Ind. —; *Emerick v. Miller*, ante, 317; *Weiss v. Guérineau*, 109 Ind. 438, 443, 444; *Vanfleet*, Collat. Attack, §855; *Black*, Judgments (2d ed.), §245, and cases cited in note 1, and §§972, 973; *Indianapolis, etc., R. Co. v. Harmless*, 124 Ind. 25.

While the validity of the proceedings as they appeared of record could not be questioned by an answer, they were subject to a direct attack for fraud relating to an act in securing jurisdiction, or concerning the trial, or the judicial proceedings themselves. 17 Am. & Eng. Ency. Law (2d ed.), 828, 829.

It is said in *Freeman*, Judgments (4th ed.), §99, that "The maxim 'that fraud vitiates everything,' is applicable to judgments." Upon proof of fraud, or collusion in their procurement, they may be vacated at any time. In *Adams School Tp. v. Irwin*, 150 Ind. 12, 17, this court stated the rule in such cases, with its limitations, as follows: "The fraud that will annul or vacate a judgment, is not that arising out of the facts which were actually or necessarily in

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issue in the cause in which it was rendered. The rule is that the fraud which vitiates a judgment, must arise out of the acts of the prevailing party, by which his adversary has been prevented from presenting the merits of his side of the case, or by which the jurisdiction of the court has been imposed upon. Or, in other words, the fraud relied on must relate to some act in securing jurisdiction, or as to something done concerning the trial, or the judicial proceedings themselves; and the rule has no application to cases of fraud in the transaction, or matters connected with it, out of which the legal controversy arose."

The adjournment of the court without day ended its power over the business and records of the term. *Newman v. Hammond*, 46 Ind. 119; *Ferger v. Wesler*, 35 Ind. 53; 1 Ency. Pl. & Pr., 203, and note 3. After such adjournment no defaults could be taken, no judgments rendered, no orders made, or proceedings had as of the term. All persons summoned or recognized to appear at the term, who had not been called, were authorized to depart from the court, to presume that no further proceedings would be taken against them at that term, and to cease their attendance upon the court until its next term. After the announcement of a final adjournment, the statutes gave the judge no authority to reconvene the court, or to hold an adjourned term on the same or on any subsequent day, without the notice prescribed by law. §1443 Burns 1901. The action of any party, or his attorney, in causing defaults to be entered, or judgments to be rendered, after such final adjournment, would, in legal effect, be a fraud upon the person defaulted, or against whom the order or judgment was made or rendered; and for such fraud the judgment, order, or proceeding so obtained could be set aside or vacated in a direct action in the same court, between the same parties or their representatives, for the annulment of the judgment. *Grattan v. Matteson*, 51 Iowa 622, 2 N. W. 432; *Scudder*

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v. *Jones*, 134 Ind. 547; *Haggerty v. Phillips*, 21 La. Ann. 729.

In *Cotterell v. Koon*, 151 Ind. 182, 185, it was said: "An attack upon a judgment for fraud in its procurement is regarded as a direct attack, which is permitted, notwithstanding the decree or judgment questioned may appear upon its face in all respects regular and valid. * * * It would certainly be a rare instance in which the decree would disclose the fraud or imposition upon the parties or upon the court."

The opinion in *Asbury v. Frisz*, 148 Ind. 513, 518, declares: "That a judgment procured by fraud may be attacked directly and set aside in a proceeding instituted for that purpose, has often been decided." See, also, *Hollinger v. Reeme*, 138 Ind. 363, 24 L. R. A. 46, 46 Am. St. 402; *Brake v. Payne*, 137 Ind. 479, 481; *Thompson v. McCorkle*, 136 Ind. 484, 492, 493, 43 Am. St. 334; *Penrose v. McKinzie*, 116 Ind. 35; *Weiss v. Guerineau*, 109 Ind. 438, 443; *Earle v. Earle*, 91 Ind. 27; *Hogg v. Link*, 90 Ind. 346. In *Wilhite v. Wilhite*, 124 Ind. 226, 230, it is said: "A proceeding instituted to set aside a judgment because of fraud in its obtainment is regarded as a direct, and not as a collateral, attack upon it." *Nichols v. Wimmer* (Tex. Sup.), 19 Reporter 475; *People, ex rel., v. Temple*, 103 Cal. 447, 37 Pac. 414; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229, 74 Am. St. 845.

The cases of *Harman v. Moore*, 112 Ind. 221, 228, and *Cully v. Shirk*, 131 Ind. 76, 31 Am. St. 414, holding that any attack upon a judgment apparently valid, the sole purpose of which is to have the judgment declared void by showing facts *de hors* the record, is a collateral attack, and therefore inadmissible, are, so far as they conflict with the rule announced in the present case, disapproved.

In the case before us, the attack upon the judgment is by cross-complaint by the principal and his surety in the recognizance in an action by the State upon the recogni-

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zance. The proceeding by cross-complaint stands upon the footing of an original and independent action, and the judgment may be vacated for fraud in its procurement when impeached in that manner as well as if the same relief had been sought in a separate action. *Chandler v. Citizens Nat. Bank*, 149 Ind. 601, 605; *Anderson v. Wilson*, 100 Ind. 402, 405; *Branch v. Foust*, 130 Ind. 538, 542; *Watts v. Sweeney*, 127 Ind. 116, 22 Am. St. 615.

The purpose of the cross-complaint was to show that the judicial proceeding upon which the principal action was in part founded, was void for fraud, because in fact taken in vacation, although purporting to have been taken in term. The cross-complaint related to the subject-matter of the original complaint, and did not introduce any new and distinct matter not essential to the determination of the main controversy. It was, therefore, properly filed in the case. *Swift v. Brumfield*, 76 Ind. 472; *Williams v. Boyd*, 75 Ind. 286, 292; *Sterne v. First Nat. Bank*, 79 Ind. 560; *Dice v. Morris*, 32 Ind. 283, 292.

The court did not err in its refusal to strike out the cross-complaint, nor in its rulings on the demurrers to that pleading. While the answer was bad for the reasons already given, yet, as all of the facts which could have been given in evidence under it were admissible under the cross-complaint, the error in overruling the demurrer to it was harmless.

The grounds of the motion for a new trial were the admission by the court of evidence to sustain the allegations of the cross-complaint that the forfeiture of the recognizance was taken after the final adjournment of the court, and that the former judge of the court, who directed the forfeiture to be entered, was permitted to testify to facts impeaching the validity of that proceeding. What has already been said fully covers the principal question presented by the motion. The trial court did not err in admitting evidence of the final adjournment of the court before the defendant

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was called or the forfeiture taken. We have no doubt whatever as to the competency of the former judge of the Greene Circuit Court as a witness to establish these facts. Besides, being no longer the judge of the court he stood upon exactly the same footing as any other witness. §504 Burns 1901; *Jordan v. State*, 142 Ind. 422; *State v. Duffy*, 57 Conn. 525, 18 Atl. 791; 2 Hawkins, P. C. (6th ed.), chap. 46, §17; *Welcome v. Batchelder*, 23 Me. 85.

There is no error in the record. Judgment affirmed.

COLLINS v. AMISS, TRUSTEE.

[No. 19,701. Filed January 7, 1903.]

CONTRACTS.—*Complaint for Breach.—Pleading.—Performance of Condition Precedent.*—In pleading the performance of the conditions precedent in a contract, it is sufficient, under §370 R. S. 1881, to allege generally that the party "performed all the conditions on his part;" but if a party does not avail himself of said statute, by making the general allegation thereby authorized, he must allege the performance of all conditions precedent with the particularity required by the rules of the common law.

From Huntington Circuit Court; *J. C. Branyan*, Judge.

Action by Joseph G. Amiss, trustee, against William H. Collins. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

J. B. Kenner, U. S. Lesh and Eben Lesh, for appellant.
S. M. Sayler, M. L. Spencer, W. A. Branyan and H. B. Spencer, for appellee.

MONKS, J.—Appellee brought this action against appellant to recover upon a written contract. A trial of said cause resulted in a judgment in favor of appellee. It is insisted that the court erred in overruling appellant's demurrer for want of facts to the amended complaint.

159	593
163	647
159	593
1164	378
159	593
e168	61

Appellant was to purchase one of the lots upon the terms mentioned in said written contract which reads as follows: "We the undersigned hereby agree with Joseph G. Amiss, trustee, that we will purchase at and for the price of \$200 per lot,—lots to be 50 feet by 120 feet deep,—the number of lots set opposite our names, and pay therefor upon the terms hereinafter named. Said lots to be in a tract of land in Huntington county, Indiana, known as the Taylor farm, being a part of the east half of the northeast quarter of section twenty-two, township twenty-eight north, range nine east, being the land immediately south of Rabbit Run creek,—upon the following conditions: That the said Amiss, trustee, shall cause to be located and erected a 50 by 140 ft. two story and basement brick and stone building and engine room attached upon said tract herein named for the purpose of operating a factory in the manufacture of boots and shoes, agreeing to employ 75 to 200 hands and continue the same for a period of not less than five years, all of which is guaranteed to said Amiss by contract with The Footcarrall, Barker & Brown & Co., now of Lafayette, Indiana. We further agree that when 140 lots are subscribed for, and the foundation of said building is completed, we each agree to pay to said Amiss one-sixth of the purchase price of the lots so purchased severally, and when the roof is on said building we agree to pay an additional one-sixth each of the purchase price of the lots so purchased severally, and at the same time execute notes and mortgage, one due in one year and one due in two years from date, each note for the one-third of the purchase price, bearing six per cent. interest from date per annum, payable annually, and receive a warranty deed and abstract for said lot. The location of said lots to be determined at a meeting of lot purchasers by some plan determined by them in such meeting, and this subscription to be void and inoperative if the construction of said building is not commenced within sixty

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days from the date of our subscription. All moneys to be paid to Citizens' Bank, Huntington, Indiana.

NAME.	LOT.	NAME.	LOT.
William H. Collins	1"		

The contract does not show when it was executed. The objection urged against the complaint is that it does not show by specific and particular averments or otherwise that all the conditions precedent in said contract had been complied with before the commencement of the action, nor give any excuse for failing to do so.

Section 373 Burns 1901, §370 R. S. 1881 and Horner 1901, provides that, "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part." The amended complaint contains the allegation that "the plaintiff, in accordance with the contract with the defendant, tendered to the defendant a good and sufficient warranty deed" which, the appellee insists, is a compliance with §373, *supra*. This allegation, however, only shows a compliance with the provision of the contract which requires appellee to execute to appellant a deed for said lot.

If a party does not avail himself of the provisions of said §373, *supra*, by making the general allegation thereby authorized, he must allege the performance of all conditions precedent with the particularity required by the rules of the common law. *Board, etc., v. Hill*, 115 Ind. 316, 322; *Commercial, etc., Co. v. State, ex rel.*, 113 Ind. 331, 332; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270, 273; *Home Ins. Co. v. Duke*, 43 Ind. 418, 421; 4 Ency. Pl. & Pr., 632-635.

The facts alleged in the amended complaint do not show that 140 lots had been subscribed for, and that the foundation of a building of the kind and dimensions specified in

the contract had been completed on the real estate mentioned in said contract, and that the construction thereof had been commenced within sixty days from the date of the subscription. To enable appellee to recover the first instalment of one-sixth of the purchase money under said contract, a compliance with such conditions should have been alleged, as authorized by §373, *supra*, or by specific and particular averments, as required by the rules of the common law. *Magic Packing Co. v. Stone-Ordean, etc., Co.*, 158 Ind. 538, and cases cited; *Dalrymple v. Lauman*, 23 Md. 376, 398; *Turner v. Barker*, 30 Ark. 186; *Bucksport, etc., R. Co. v. Brewer*, 67 Me. 295, 297; *Persinger v. Beville*, 31 Fla. 364, 368-369, 12 South. 366; *Caldwell v. Harrison*, 11 Ala. 755; *Frisbie v. Moore*, 51 Cal. 516, 518; *Levy v. Burgess*, 64 N. Y. 390, 394; *Slater v. Emerson*, 19 How. 224, 15 L. Ed. 626; *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360.

The conditions upon which each instalment was to become due and payable, and when appellant was to execute his notes and mortgage, are stated in the contract, and the same can only be required of appellant when the said conditions are complied with, or a sufficient excuse for not doing so alleged.

As the other questions argued may not arise again they are not considered.

Judgment reversed with instructions to sustain appellant's demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

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FREESE v. THE STATE.

[No. 19,828. Filed January 7, 1903.]

MURDER.—*Indictment.*—An indictment for murder charging that defendants on a certain day "at the county and State aforesaid, did then and there feloniously, purposely, and with premeditated malice, kill and murder one William Gray, by then and there feloniously, purposely, and with premeditated malice, shooting at, against, and into, and thereby mortally wounding the said Gray, with a certain deadly weapon, called a revolver, then and there loaded with gunpowder," etc., sufficiently describes the offense charged. p. 598.

CRIMINAL LAW.—*Evidence.*—*Acts and Declarations of Third Party.*—*Admissibility.*—Where on the trial of one charged with a crime, a common purpose between defendant and her husband to carry out the unlawful act has been established by proper evidence, the acts and declarations of the husband in furtherance of the common purpose are admissible in evidence whether made in the presence of the defendant or not. pp. 600-602.

TRIAL.—*Motion to Strike out Evidence.*—*When Premature.*—Where a witness is permitted to testify to certain facts upon the promise to the court, made by the party offering the evidence, that other testimony would be introduced which would render the offered evidence admissible, a motion to strike out made at the close of the witness' testimony, and not at the close of the testimony on that particular point, was premature. pp. 603.

MURDER.—*Insanity.*—*Sufficiency of the Evidence.*—A defendant charged with murder pleaded insanity, and introduced testimony tending to prove her mental unsoundness. The State offered in rebuttal no evidence to the contrary. *Held*, that the jury was not bound to acquit the defendant; since they, being the sole judges of the weight of the evidence, might find the same unworthy of belief, and disregard it. pp. 603, 604.

From Shelby Circuit Court; *Douglas Morris*, Judge.

Myra Freese was convicted of murder in the second degree, and appeals. *Affirmed.*

L. E. Ritchey, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores* and *C. C. Hadley*, for State.

HADLEY, C. J.—Appellant was indicted jointly with her husband Martin Freese, for the murder of William Gray,

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on July 25, 1901. Appellant's motion to quash the indictment was overruled, and, upon her plea of not guilty, she was accorded a separate trial by jury, which resulted in a verdict of guilty of murder in the second degree, upon which verdict, over her motion for a new trial, she was sentenced to confinement in the woman's prison for and during her natural life.

The indictment, in substance, charges that appellant and Martin Freese on the 25th day of July, 1901, at the county and State aforesaid, did then and there feloniously, purposely, and with premeditated malice, kill and murder one William Gray, by then and there feloniously, purposely, and with premeditated malice, shooting at, against, and into, and thereby mortally wounding the said William Gray, with a certain deadly weapon, called a revolver, then and there loaded with gunpowder and leaden balls of which mortal wounding the said William Gray then and there instantly died, etc.

The objection to the indictment is that it does not describe the offense with sufficient certainty. The statute requires that an indictment contain "a statement of the facts constituting the offense, in plain and concise language without unnecessary repetition." §1800 Burns 1901. We do not perceive wherein the indictment before us fails to conform to both the letter and spirit of the statute. No reasonable doubt can arise as to the place, or as to the precise nature of the offense charged, or as to the means by which it was committed, or as to the person against whom it was committed, and, with these things stated in clearness and certainty, the indictment must be held sufficient. The defendant pleaded not guilty and filed a special answer of insanity.

The undisputed facts are these: The appellant is fifty-nine years of age, and lived with her husband in Franklin, Johnson county, Indiana. The deceased had previously boarded with them, and within a few weeks before the

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homicide, he, as appellant claims, went to her house and assaulted her. Soon thereafter, in informing her daughter about the assault, appellant cried and appeared much excited. The deceased, a stone-mason, on July 25, 1901, was engaged under the Red Mill, repairing the foundation for Mr. Rasp, which mill is in Shelby county, eight or ten miles distant from Franklin. In the forenoon of that day appellant, traveling with her husband in a buggy, went from Franklin to the Red Mill; and as they approached the latter place they were met by Mr. Rasp, the mill owner. A little conversation ensued. Rasp asked Martin Freese if he was looking for a job, and the latter replied that he was. Martin Freese then asked where Billy Gray was, and was informed that he (Gray) was at work under the mill. Rasp then invited appellant to go to the house, which was near by, where she would find women to entertain her; but she declined, remarking that she would go with her husband. Together appellant and her husband proceeded under the mill, where they had been informed Gray was at work, and, seeing Gray, they at once approached him, the husband holding on to appellant's arm, and, without any one uttering a word, appellant presented a revolver and shot him. Gray staggered away about nineteen feet and fell, whereupon appellant walked to him, and standing over him fired another shot into his body. Then, without saying a word, appellant and her husband left the mill together, and went to their buggy where they were joined by Brandenburg, to whom Martin Freese, in the presence of appellant, in explaining the act, said: "This is my wife. This man came down and came very near drowning her once, and tried to commit a rape, and now she gives him something." They then got into the buggy and drove to their home. Gray died almost instantly, and without speaking.

In the course of the trial, and over appellant's objection, the court permitted Joseph McCain, a witness for the State, to testify that about fifteen days before the homicide, Mar-

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tin Freese, husband of appellant, purchased of witness, who was a dealer, a second-hand revolver, and that he returned with it the same day about noon, and wanted to exchange it, saying, in the absence of his wife (the appellant), that "the revolver wasn't easy enough on trigger; that he wanted it for his wife to shoot cats with, and she didn't like it;" he then exchanged the first one purchased for a second-hand smaller one, and later on in the afternoon of the same day he again returned, and exchanged the second revolver for a third and new one, he paying the dealer one more dollar; that the day before the tragedy Martin came again and wanted to purchase another revolver, and witness inquired what he wanted another one for, and Freese replied that he was going a fishing and he wanted it to shoot fish; that "the other one was for his wife and he wanted one for himself."

Appellant's counsel complains of the admission of this testimony, because, as he insists, the declaration was made in the absence of Mrs. Freese, without her consent or knowledge, and without other evidence of collusion between them. We recognize the general rule to be that the acts and declarations of third persons, made in the absence of the accused, are not admissible in evidence against the latter when placed upon his trial; but, when it appears to the satisfaction of the trial court that a *prima facie* case of concert to perform the unlawful act has been shown, the fact of such concert may then become a material question in the case, for the ultimate determination of the jury. And when such *prima facie* case is established to the satisfaction of the court, then it is competent to admit against each other the acts and declarations of the wrongdoers in furtherance of the common purpose. "When a common purpose to prosecute an unlawful scheme has been shown," said Mitchell, J., in *McKee v. State*, 111 Ind. 378, "the overt acts or declarations of any one, or all concerned, while engaged in the execution of such purpose, are admissible." *Card*

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v. *State*, 109 Ind. 415; *Walton v. State*, 88 Ind. 9; *Williams v. State*, 47 Ind. 568; *State v. McGee*, 81 Iowa, 17, 46 N. W. 764; 1 Greenleaf, *Evidence* (15th ed.), §111.

Neither in creating a *prima facie* case for the court in the first instance, nor in proving the ultimate fact to the jury, is it necessary to show tortious coöperation by evidence of an express agreement to engage in a common purpose leading to the unlawful result; but the fact of combination, as well as the appearance, may arise from inference and circumstantial evidence alone. *Archer v. State*, 106 Ind. 426, 432.

An eminent author says: "The actual fact of conspiracy may be inferred, as has been said, from circumstances. * * * Any joint action on a material point, or collocation of independent but coöperative acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer concurrence of sentiment." Wharton, *Crim. Law* (9th ed.), §1398.

In determining such *prima facie* case, it is also proper for the court to consider, in connection with the proved facts, a promise made by the prosecuting attorney of his ability and intention to show by other evidence that the accused on trial advisedly acted with another or others in the doing of things which led up to, or in preparing for the final consummation of, the unlawful act. "Sometimes, for the sake of convenience," says Professor Greenleaf in his work on evidence, "the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause." 1 Greenleaf, *Evidence* (15th ed.), §111; *State v. Grant*, 86 Iowa 216, 53 N. W. 120; *Avery v. State*, 10 Tex. App. 199; *Johnson v. State*, 29 Ala. 62, 64 Am. Dec. 383; *Hall v. State*, 31 Fla. 176, 12 South. 449; 6 Am. & Eng. Ency. Law (2d ed.), 869.

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It should be borne in mind that the question we have relates to the action of the trial court in holding, when the McCain testimony was offered, that, from the facts then before the court and promised by the prosecuting attorney, it *prima facie* appeared that appellant and her husband had acted together in the common purpose of accomplishing the death of William Gray. At the time of the offer the case stood thus: It already appeared from the proof that appellant had a grievance against the deceased for assaulting her, which occurred a few weeks before the homicide. On the day of the tragedy the husband conveyed the wife in a buggy ten miles into the country to where the deceased could be found. When they arrived at the mill, and had been informed where Gray was, the wife insisted upon accompanying her husband down under the building where Gray was at work. Together they approached the deceased, the husband supporting the wife, stopping within a few feet of their victim; and, while the husband stood holding his wife by the arm, she produced a revolver which she carried and shot the man against whom she had the grievance. The shooting was done without excitement, without any expression of surprise, and without the slightest effort on the part of Martin Freese to restrain his wife in the execution of her purpose to kill. The design to kill had been previously formed. Naturally its formation took place after the wrong was suffered. In characterizing the conduct of the husband and wife with respect to their supposed coöperation in the killing of Gray, their relation as husband and wife, the nature of the injury suffered by the wife, their journeying together to the Red Mill, the *non-chalant* manner of both when the deed was done, and in the return home, were facts proper to be considered by the court in connection with the promise of the prosecuting attorney to connect the defendant with the purchase of the pistol. These facts were certainly sufficient, *prima facie*,

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to justify the court in admitting the testimony offered by the prosecutor.

At the conclusion of the direct examination of the witness McCain, and before his cross-examination, even, appellant moved the court to strike out the witness' testimony. In any view of the case this motion was premature. The prosecuting attorney had not promised to prove by the witness McCain, alone, the wrongful coöperation of appellant and her husband, and the motion to strike out should have been postponed at least until the State had concluded its evidence upon that point.

The court denied appellant the right to prove by Joseph Dunlap a conversation had between the witness and Martin Freese on the day before the homicide relative to the latter's obtaining employment at the Red Mill. Martin Freese was not on trial and we think the evidence was immaterial.

The refusal of the court to give certain instructions to the jury is waived for failure to present them.

Appellant introduced two expert and two non-expert witnesses in support of the issue of insanity. One of the non-experts was her daughter who testified to facts that indicate a disordered mind. The other, McKinney, seventy-one years old, had lived near appellant and knew her well from 1883 to 1885, since which time he knew but little about her, and had seen her only occasionally. Four or five weeks before the homicide he saw her "act strangely," like she was crazy, or intoxicated. He had heard others say that she used intoxicating liquors. He knew nothing of her mental condition about the time of the tragedy. In answer to a hypothetical question composed of facts chiefly testified to by appellant's daughter, Doctor Sterne said: "Upon that state of facts I should be very much inclined to consider that woman of unsound mind,—of course accepting as true everything stated in the hypothetical question." Doctor Payne said in answer to the same question: "I would say that the manifestations as narrated there would indicate a

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mental perversion that went to a degree that would be highly suggestive of the mental state called insanity. While this is true I could not say that the manifestations as given would be sufficient to clearly establish in my mind the fact of her being absolutely insane," and upon cross-examination said: "I should hesitate upon that evidence to sign a commission of lunacy."

The State introduced no evidence in rebuttal on the question of appellant's sanity, and for this reason appellant insists that the verdict was contrary to law. The substance of the argument is that as appellant offered evidence tending to prove appellant's unsoundness of mind, the jury was bound to acquit, in the absence of direct proof to the contrary. Unquestionably the sanity of the defendant must appear beyond a reasonable doubt, and, when the presumption of sanity that attends every one has been overthrown or impaired, the State must reestablish it by competent proof, or the defendant should be acquitted. But it is the province of the jury, under proper instructions, to determine when the condition of sanity has been made doubtful, and when the doubt has been removed.

All testimony is not proof. That only is proof which convinces. It may be, and in fact we must assume, that the jury, for what seemed to them sufficient reason, wholly discredited the testimony of appellant's daughter. She alone of all appellant's neighbors and friends detailed facts inconsistent with a sound mind, and gave all the evidence that was produced in support of the principal facts propounded to the experts as a hypothetical question. If the jury, as they had the right to do, declined to accept the facts of the hypothetical question as proved, then the answers of the experts founded thereon, whatever they amounted to, went for nothing. So it is, if the jury, being the sole judges of the weight of the evidence, found the evidence offered by appellant unworthy of belief, they had a right to disregard it.

We find no available error. Judgment affirmed.

JOHNSON v. THE CENTRAL TRUST COMPANY,
RECEIVER.

[No. 19,995. Filed January 7, 1903.]

159	605
161	275
159	605
165	15
159	605
167	300

RECEIVERS.—Report.—Exceptions.—Pleadings.—The report of a receiver and an exception thereto, stand as the complaint and answer of the respective parties. *p. 608.*

SAME.—Supplemental Report.—Where a receiver filed a final settlement report to which exceptions were taken, the filing thereafter of a supplemental report did not serve to take the first out of the record. *p. 608.*

SAME.—Effect of Discharge of Receiver on Judgment of Allowance.—A judgment of allowance against a fund in the hands of a receiver does not become a technical lien on the property which comprises the assets, and therefore a discharge of the receiver without any reservation as to existing claims will release, not only the receiver, but also the property, from further liability. *p. 609.*

SAME.—Discharge of Receiver.—Collateral Provision for Payment of Claim.—A collateral provision made by a receiver for the ultimate satisfaction of an allowance judgment against the trust fund will not justify the final discharge of the receiver before such judgment is paid, where it is not shown that the claimant was a party to the arrangement. *pp. 609-614.*

CONTRACTS.—For Benefit of Third Person.—A contract for the benefit of a third person does not become the contract of such person, creating a liability in his favor, until by some overt act of acceptance he elects to make the contract his. *pp. 610.*

From Johnson Circuit Court; *W. J. Buckingham*, Judge.

The Central Trust Company filed report as receiver of the estate of James T. Polk, to which Grafton Johnson filed exceptions. From a judgment discharging receiver, Johnson appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

G. M. Overstreet, E. L. Branigin, E. A. McAlpin, R. M. Miller and H. C. Burnett, for appellant.

L. J. Hackney and C. F. Coffin, for appellee.

GILLET, J.—Appellee, The Central Trust Company, being the receiver of the estate of James T. Polk, filed its

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report in final settlement of said estate. The report showed that the trust property consisted of two plants and the stock on hand and accounts receivable pertaining to each. Among other debts, the receiver reported a judgment of allowance rendered in said receivership, in favor of appellant, in the sum of \$9,500, for services in the matter of said trust as a former receiver thereof, which judgment it was reported had been appealed from, and that a *supersedeas* bond had been given in the sum of \$12,000 in the matter of said appeal. With respect to that portion of said property that was denominated in the report as the dairy plant, the receiver reported that it had the opportunity of selling the same to responsible parties, who would assume certain liabilities, not including the judgment of appellant. The receiver further reported that it and said James T. Polk had sold the plant that was denominated in the report as the packing plant, together with all of the remaining property and assets of every sort and description belonging to said trust, to a corporation known as the J. T. Polk Company, payable by the transfer of a certain amount of the capital stock of the corporation, and that the latter had agreed to assume and pay all remaining liabilities, so far as the same might be determined to be valid. It was further stated in the report that the trust was entirely solvent. The report concluded with a prayer that the matters and things set out in said report be inquired into by the court, and, if found correct, that said receiver be discharged. The theory of said report seems to be that the financial plans set forth, and in part reported as perfected, have rendered the trust solvent, and that therefore the court should release its jurisdiction over the same.

The appellant filed exceptions to said report. These exceptions do not differ in their substance. The first alleges the obtaining of said judgment; the pendency of said appeal; that one of the errors assigned on said appeal was the overruling of a motion for a new trial made by the opposite

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party therein; that if said cause should be reversed on appeal it would be returned to the Johnson Circuit Court for a second trial; and that if said trust should be terminated there would be no available property or assets out of which any judgment that might be obtained could be collected.

Appellee The Central Trust Company demurred to said exceptions for want of facts. The court sustained said demurrer, and appellant excepted. Six days later the receiver filed a report that he therein denominated as a supplemental report, showing the payment, since the filing of its final report, of certain claims, other than that of appellant, and further representing that said J. T. Polk Company had on deposit with said The Central Trust Company a balance in the sum of \$2,000, with which to pay any unpaid claims that might be determined to be valid and enforceable. On the day that said supplemental report was filed an order was entered providing that, as a condition precedent to the approval of said final and supplemental reports, said receiver should file a bond, with sureties to be approved by the court, to protect the claim of appellant and all other persons having claims against said trust. A bond was thereupon reported in the sum of \$20,000, signed by said James T. Polk and sureties, who justified in an ample sum, payable to the clerk of said court, for the use of said appellant and all other unpaid claimants whose claims might be finally adjudged valid. Said bond fully recited the facts, and stated that it was given in consideration of the discharge of said receiver and the release of the trust property; and said obligors agreed that "they, or either of them, may be substituted in any litigation now or hereafter pending in any of the courts of this State upon any such claim, as defendants, in lieu of said receiver," and that they would "severally enter an appearance to such litigation in such courts, and submit to such determination as may be had at the close of such litigation, and abide and pay the judgment or judgments rendered against them." Upon the presentation of

this bond, it was approved, the receiver ordered discharged, and the trust declared terminated and closed.

The report of a receiver, and an exception filed thereto, stand as the complaint and answer of the respective parties. *Brownlee v. Hare*, 64 Ind. 311; *Wysong v. Nealis*, 13 Ind. App. 165; *In re Hart*, 60 Hun 516, 15 N. Y. Supp. 239; *In re Heuser*, 87 Hun 262, 33 N. Y. Supp. 831. As said in the case last cited: "It has been many times held in these proceedings that the account filed and the objections thereto represent the pleadings of the parties, and that the issues to be tried are to be determined therefrom."

Appellee's counsel insist that the exception reserved to the ruling on the exceptions to the first report presents no question, because of the filing of the subsequent report. It is assumed by counsel that the latter report took the former report out of the record. In this assumption counsel are in error. The two reports together in effect constituted the complaint in the action, but, if the first report did not state facts sufficient to authorize the receiver's discharge, it could not be aided by the supplemental report. *Barker v. Prizer*, 150 Ind. 4. Particularly ought these rules of practice to be applied where the second pleading or report in nowise changes the real question, and where the exception or answer is a sufficient answer to the original and supplemental complaints or reports. See *Ellis v. City of Indianapolis*, 148 Ind. 70.

By obtaining a judgment of allowance against the fund, appellant obtained an equitable interest therein, and it was the duty of the court to guard such interest. Mr. High, in his work on receivers, states that the better doctrine, as deduced from the clear weight of authority and from the better legal reasoning, is that the defendant is not entitled to have the receivership terminated by the satisfaction or extinguishment of the plaintiff's demand; that the duty of the court being to protect the rights of all parties to the action, it will not permit the receiver to be discharged when

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it appears that such discharge may prejudice the rights of other parties to the action who do not consent thereto. *High, Receivers* (3d ed.), §837.

A judgment of allowance against a fund does not become a technical lien on the property which comprises the assets, as a judgment lien is but the creature of statute, and there is no statute providing for a lien in such circumstances. *McAfee v. Reynolds*, 130 Ind. 33, 18 L. R. A. 211, 30 Am. St. 194. The effect, therefore, of a discharge of a receiver, and the surrender of jurisdiction over the trust, without any reservation as to existing claims, is to release not only the receiver, but also the property from further liability. *Kerr v. Little*, 39 N. J. Eq. 83; *Davis v. Duncan*, 19 Fed. 477; *Farmers, etc., Co. v. Central Railroad of Iowa*, 7 Fed. 537; *High, Receivers* (3d ed.), §848.

It has been held by this court that a decedent's estate should not be finally settled while a claim that has been filed has not been paid or disposed of. *Reed v. Reed*, 44 Ind. 429; *Heaton v. Knowlton*, 65 Ind. 255; *Roberts v. Spencer*, 112 Ind. 81; *Dillman v. Barber*, 114 Ind. 403. A number of the cases cited are cases where the claims were pending on appeal. We perceive no reason why the same rule of law should not apply to a receivership,—at least as against a claim that has the *status* of the one here involved.

Counsel for appellee contend for the authority of the court to settle a receivership with a claim pending, by making a collateral provision for its ultimate satisfaction, as was done in this case, and this seems to have been the theory on which the court proceeded in disregarding the exceptions. It is also claimed by counsel for appellee that the claims have been "disposed of," within the meaning of the authorities, and this leads us to consider the legal effect of the arrangement that is characterized as a disposition of the claims.

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As heretofore stated, the contract which furnished the basis on which the order for a surrender of jurisdiction over the trust was made was a contract which provided that it should be in favor of the clerk of the court for the use of appellant and the other claimants. A contract for the benefit of a competent third person may become available to the latter, provided that it is not rescinded by the parties thereto before such third person gives notice that he accepts it. *Davis v. Calloway*, 30 Ind. 112, 95 Am. Dec. 671; *Carnahan v. Tousey*, 93 Ind. 561; *Romaine v. Judson*, 128 Ind. 403; *Whicker v. Hushaw*, 159 Ind. 1. Except where from the nature of the case a demand ought to be made before suit, as pointed out in some of the authorities cited below, the rule is that a third person may sue on a contract for his benefit, without a previous election, on the theory that the institution of suit is an election; that the election to take the benefit, which is the foundation of the right of action, and the institution of the suit, may be concurrent acts. *Copeland v. Summers*, 138 Ind. 219; *Carnahan v. Tousey*, *supra*; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Durham v. Bischof*, 47 Ind. 211. But in no case does the contract become the contract of such third person, creating a liability in his favor, until by some overt act of acceptance, either by suit or otherwise, as the circumstances may admit of, he elects to make the contract his. *Davis v. Calloway*, *supra*; *Carnahan v. Tousey*, *supra*. It is the law that creates the necessary privity, upon the acceptance of such third party, and he thereby secures the advantages and must bear the burdens that properly belong to him as a party to the contract. *Johnson v. Collins*, 14 Iowa 63; *Brewer v. Dyer*, 7 Cush. 337; *Bohanan v. Pope*, 42 Me. 93.

The contract under consideration is of a nondescript character. If valid, it could not be said that appellant was a stranger to the consideration, since assets on which he had a right to rely for the satisfaction of his judgment were

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ordered released in consideration of its execution. For that reason, it would not, perhaps, assuming the validity of the contract, be revocable by the obligors and the clerk, who, as stated, was the obligee. Appellant was, however, a stranger to the contract. No contract, express or implied, can be created without the consent of the person to whom performance is due. Until appellant elected to take the benefit of the instrument, it was not a contract as to him. The clerk could not sue on the contract, as the trustee of an express trust, to recover in favor of a *sui juris* beneficiary who refused to elect to be bound by the contract; for the instrument must be enforceable as against the *cestui que trust*, so as to make him bear the burden imposed on him, or else it is lacking in mutuality. It may therefore be said that such an instrument would be a mere offer of a contract.

The court was authorized to exercise jurisdiction over appellant's claim, but, as we have seen, the consent of the claimant was a necessary element in the formation of the contract, and this the court lacked power to enforce. The case then amounts to this: It was proposed by the court, without having created any present contract that it might even be contended amounted to a bringing of such obligation within the scope of the trust, but upon the mere offer of a contract, to renounce its rightful jurisdiction, and debar appellant from a remedy against the property involved in the receivership; leaving him then or subsequently to elect to accept a collateral benefit, or else to remain remediless. Referring to the particular instrument taken, its language can not even be construed as a submission by the obligors to the jurisdiction of the court in the receivership. The instrument rather purports to contain a covenant on their part that they will appear without process in any court in which an action may be instituted against them on such bond, and the remedy for the breach of such covenant is merely the recovery of damages for failing to appear.

Appellant has a claim that he has reduced to judgment, so the presumption must be in favor of its equitable character, and the court, instead of granting him a remedy,—the very purpose for which courts are constituted, where there is a right to a remedy,—proposed to relinquish its jurisdiction and drive appellant to a remedy upon a bond, in a perhaps distant court, involving costs and attorney's fees, and possible uncertainties as to the result of the litigation, to recover against obligors that he never agreed to accept as such. Our statutes contain a number of provisions for the taking of bonds in connection with judicial proceedings where the obligee does not consent thereto. In such a case the bond owes its obligatory character to the fact that a statute provides for it. But we hold that there is no authority for a court to relinquish entire jurisdiction over the property of a receivership where a claimant has reduced his claim to judgment therein.

In *Bainbrigge v. Blair*, 3 Beav. 421, receiver had been appointed by reason of the misconduct and incapacity of trustees, and it was held that the receiver might be removed upon the appointment of new trustees to receive and apply the rents and profits as the receiver had been directed to do. The propriety has been seemingly recognized, in some circumstances, of turning the property over to the defendant in the action, with an express reservation of jurisdiction over the property to enforce payment, satisfaction, or discharge of the debts and liabilities of the receivership. *Farmers, etc., Co. v. Central Railroad of Iowa*, 7 Fed. 537; *Davis v. Duncan*, 19 Fed. 477. The condition of the trust might be such in some cases that the court might be justified in surrendering a part of the *corpus* of the estate to the defendant. There can be no hard and fast rule laid down for all cases, but at least as against creditors who, upon intervention or otherwise, have become parties to the suit and obtained judgments of allowances, the court can not, without their consent, abdicate its jurisdiction and relegate

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them to the pursuit of contract remedies that it has sought to establish for them. It is the principal business of the court in the case to protect such creditors, and to protect them by the exercise of its jurisdiction. It can not rightfully detach their claims from such portion of the trust property or its proceeds as it is necessary to retain to insure the payment of such claims.

The case of *Popper v. Scheider*, 7 Abb. Pr. N. S. 56,—a superior court case,—affords the nearest precedent for the procedure of the court below. In that case the defendants made a showing, at the threshold of the proceeding, that the plaintiff had no interest in the property except to the extent of \$1,800, plus a share of the undivided profits to an extent not exceeding seven per cent., and that the business would be greatly injured if the receivers were continued. It was held that upon an offer to pay in said sum of \$1,800, and to give a bond to insure the payment of the undivided profits, the court could put the plaintiff to the alternative of accepting said offer, or submitting to a discharge of the receiver. The case mentioned is not in point. It appeared that the interest of the plaintiff, over and above the sum of \$1,800, was small, and not established, and that great prejudice would result from a continuance of the receivership, and the application was made as soon as the defendants appeared. While the court in that case could not, as was attempted here, have taken a contract on behalf of the plaintiff, it might, perhaps, in view of the circumstances, have rightfully put the plaintiff to his election to accept the offer or submit to a dismissal of his suit, on the principle that he who asks equity must do equity. It is not necessary to approve the case cited. It suffices to distinguish it.

Whatever may have been the *status* of the bond given herein as against the obligors, we hold that the making of contracts, not provided for by law, requiring the pursuit of collateral remedies to recover on claims reduced to judg-

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ment, is not within the rightful authority of a court of equity. The valid claims of creditors in a receivership must be protected by the receivership. The court below erred in sustaining a demurrer to appellant's exceptions to the final report of the receiver.

Judgment reversed, with a direction to the trial court to overrule the demurrer to said exceptions, and for further proceedings not inconsistent with this opinion.

Dowling, J., did not participate in the consideration or decision of this case.

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NAPPANEE CANNING COMPANY ET AL. v. REID,
 MURDOCH & CO. ET AL.

[No. 19,779. Filed October 8, 1902. Rehearing denied January 7, 1903.]

CORPORATIONS.—*Directors as Creditors.—Preference.*—An insolvent manufacturing corporation does not hold its property in trust for its creditors, or subject to any lien, legal or equitable, in their favor, in any other manner than such property is held by an insolvent individual debtor; and such corporation may prefer creditors for whose claims certain directors were surety, or legally bound, although the votes of such directors were necessary to authorize the execution of the instrument creating the preference. Hadley, J., dissents.

From Elkhart Circuit Court; *H. D. Wilson*, Judge,

Action by Reid, Murdoch & Co. and others against the Nappanee Canning Company and others for damages for breach of an alleged contract, and to set aside, as fraudulent, a mortgage or deed of trust. From a judgment for plaintiffs, defendants appeal. Transferred from Appellate Court, under subdivision two of §1337j Burns 1901. *Affirmed in part and reversed in part.*

J. M. Vanfleet and *V. W. Vanfleet*, for appellants.

C. W. Miller, *J. S. Drake*, *S. C. Hubbell* and *H. G. Colson*, for appellees.

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DOWLING, C. J.—Action by the appellee Reid, Murdoch & Co. against the appellants, to recover from the Nappanee Canning Company damages for the breach of an alleged contract of said company to deliver to the said Reid, Murdoch & Co. 2,000 cases of tomatoes, and also to set aside, as fraudulent, a mortgage or deed of trust executed by the said Nappanee Canning Company to one Samuel Mosiman to secure the payment of divers debts owing by the said Nappanee Canning Company to its directors and to other persons and corporations, for all of which its directors were liable. A demurrer to the complaint was overruled. The appellants answered in denial, and filed a plea of *non est factum* as to the contract in writing set out in the complaint. The record does not show any submission or trial of the cause, but a special finding of facts, with conclusions of law thereon, is set out, to each of which conclusions the appellants separately excepted. Motions for a *venire de novo* and for a new trial were overruled, and judgment was rendered against the Nappanee Canning Company for \$1,100, and against all the appellants, vacating and setting aside the mortgage or deed of trust as to each director of the company, and sustaining it as to the other creditors, whose debts were secured by it.

Various errors are assigned, but it will be necessary to consider only the second, which questions the correctness of each conclusion of law, and the fourth, which challenges the ruling of the court on the motion for a new trial.

The facts found by the court which are material to the determination of the cause on this appeal are substantially as follows: On the 7th day of April, 1897, the Nappanee Canning Company was a manufacturing corporation organized under the laws of the State of Indiana, having its principal office at the town of Nappanee, in this State; and the appellee Reid, Murdoch & Co. was a corporation organized under the laws of Illinois, and doing business in Chicago. On said day the appellant the Nappanee Canning

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Company sold and agreed to deliver to the appellee Reid, Murdoch & Co. 2,000 cases of tomatoes, such delivery to take place in lots of 1,000 cases, not later than September 15th and October 1, 1897, to be paid for in cash at sixty days, at the rate of sixty-two and one-half cents per dozen, delivered in Chicago, Illinois, less one and one-half per cent. on prompt delivery. The Nappanee Canning Company did not deliver the tomatoes. The market price advanced, and in consequence of the failure of the Nappanee Canning Company to perform its agreement, the appellee Reid, Murdoch & Co. was compelled to purchase tomatoes elsewhere at prices exceeding the contract price by \$1,100. On October 5, 1897, the Nappanee Canning Company was insolvent, and that fact was known to its directors, its assets amounting to \$9,000, and its liabilities to \$19,000, all of which were then past due. The directors of the Nappanee Canning Company were its co-appellants, Berlin, Uline, Coppes, Hartman, Wysong, Whisler, Arme, Albin, and Emmert; Berlin being the president, and Uline the secretary, treasurer, and general manager of the company. The directors were sureties, or were otherwise legally liable for all of the debts of the canning company, and, to protect themselves against loss, they caused a mortgage or deed of trust of all the property of the canning company, real and personal, to be executed by that corporation, by its president and secretary, to one Mosiman, as trustee, to secure (1) the expenses of the trust; (2) all debts due from the corporation for tomatoes bought in 1897; (3) the debts due to the Farmers & Traders Bank, of Nappanee, Indiana, evidenced by notes executed by the directors for moneys used for said company, amounting to \$4,712.10; (4) an account owing to Coppes Bros. & Zook; (5) a note for \$1,100 due to one Barber, and certain other debts due to divers persons and corporations, aggregating \$5,000; the claims classified as numbers one, two, and three, to be first paid in full. The trustee was to continue the business

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until he could effect a sale of the property of the corporation. Samuel D. Coppes and Harry E. Coppes were partners trading under the name of Farmers & Traders Bank, and Coppes Bros. & Zook were stockholders of the Nappanee Canning Company. The corporation continued to do business for about two weeks after the mortgage or deed of trust was made, and was managed by Uline, its secretary, treasurer, and general manager. None of the beneficiaries of said mortgage or deed of trust, excepting Coppes Bros. & Zook, and the directors of the corporation, knew that the said mortgage or deed of trust was to be made until after it was executed, and none of the creditors of the company, excepting those just named, was demanding payment of the claims against it. The financial condition of the canning company was better on October 5, 1897, than on April 7, 1897. The company had other contracts for tomatoes to the amount of at least 2,000 cases, which it refused to fill. The claims mentioned in said mortgage or deed of trust, and secured thereby, were just and *bona fide* debts of the said canning company, and said mortgage or deed of trust was executed by the authority of the entire board of directors of said corporation. The canning company immediately put Mosiman in possession of the property described in the mortgage or deed of trust, but without any expectation or intention that the factory would run, or business be done, more than two weeks. The acts of the directors in so securing to themselves, as indemnity, the property of the canning company were intended to make it impossible, and did make it impossible for the appellee Reid, Murdoch & Co. ever to enforce its contract, or to recover damages for the nonperformance thereof, and they meant thereby to shield themselves from further liability. Samuel Mosiman paid nothing for the property mentioned in the mortgage or deed of trust. The Nappanee Canning Company executed the said mortgage or deed of trust on October 5, 1897, for the express purpose of enabling said

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directors to indemnify themselves against all liability incurred by either of them in its behalf, and with the further intention of leaving no property out of which the appellee Reid, Murdoch & Co. could make any part of its claim, if it had a claim, and for the further reason that after the making of the contract with the appellee Reid, Murdoch & Co., the price of tomatoes had advanced about thirty cents per dozen. The said contract with the appellee Reid, Murdoch & Co. was broken, and the mortgage or deed of trust was executed for the purpose of enabling the canning company and its directors to reap the benefit of the advance in the price of tomatoes. The execution of the mortgage or deed of trust was a fraud upon the appellee Reid, Murdoch & Co., and as to the said appellee it is void. Said mortgage or deed of trust is valid as to the mortgagees, Barber, Mittenthal, guardian, Blumberg, Searer, and the City National Bank of Goshen. Mosiman is not entitled to any compensation for his services as trustee under said mortgage or deed of trust. The Nappanee Canning Company is indebted to the appellee Reid, Murdoch & Co. in the sum of \$1,100.

The conclusions of law on the foregoing finding of facts are thus stated: "(1) That plaintiff is entitled to recover from the defendant, the Nappanee Canning Company, \$1,100. (2) That the trust deed is void as to the following persons, namely: Francis E. Berlin, Barney Uline, Frank Coppes, Tobias Hartman, Henry Wysong, Jacob S. Whisler, Joseph S. Arney, John W. Albin, Ephraim Emmert, Coppes Bros. & Zook, and Farmers & Traders Bank. (3) That as to the City National Bank of Goshen, Indiana, Isaac Blumberg, and George Searer, and George Barber, M. H. Mittenthal, as guardian, said trust deed is valid, and plaintiff's rights are subject thereto."

The important questions in the case are presented by the exception to the second conclusion of law, and by the motion for a new trial. Was the mortgage or deed of trust

invalid as to the appellants, who were directors of the Nappanee Canning Company? Does the evidence sustain the finding that the appellee Reid, Murdoch & Co. is entitled to recover \$1,100 from the canning company?

In this State it is settled by a long course of decision that an embarrassed or insolvent debtor may lawfully prefer one or more of his creditors, by payment, mortgage, pledge, or deed to the exclusion of the others. No statute forbids such preferences; no rule of law is understood to prevent them. *Ball v. Barnett*, 39 Ind. 53, and cases cited; *Lowry v. Howard*, 35 Ind. 170, 9 Am. Rep. 676; *McCormick v. Smith*, 127 Ind. 230; *Carnahan v. Schwab*, 127 Ind. 507; *John Skillito Co. v. McConnell*, 130 Ind. 41; *Peed v. Elliott*, 134 Ind. 536; *Rockland Co. v. Summer-ville*, 139 Ind. 695; *Heiney v. Lontz*, 147 Ind. 417; *Snyder v. Jelton*, 137 Ind. 449. The fact that the person whose debt is so preferred is a wife or other near relative does not affect the validity of such preference. *Schaeffer v. Fithian*, 17 Ind. 463; *Kyger v. F. Hull Skirt Co.*, 34 Ind. 249; *Sims v. Rickets*, 35 Ind. 181, 9 Am. Rep. 679; *Goff v. Rogers*, 71 Ind. 459; *Hogan v. Robinson*, 94 Ind. 138; *Hoes v. Boyer*, 108 Ind. 494; *Jones v. Snyder*, 117 Ind. 229; *Laird v. Davidson*, 124 Ind. 412; *Dillen v. Johnson*, 132 Ind. 75; *Fulp v. Beaver*, 136 Ind. 319; *Adams v. Curtis*, 137 Ind. 175.

In these cases the court seems to have proceeded upon the principle that if the debt was just and the transaction honest the preference would stand. So, too, it has been uniformly held that where a partnership exists, and the partners have possession of the partnership property, it may, notwithstanding the insolvency of the partnership, be applied by the partners to the payment or securing of the debts of the individuals composing the firm. *M'Donald v. Beach*, 2 Blackf. 55; *Frank v. Peters*, 9 Ind. 343; *Schaeffer v. Fithian*, 17 Ind. 463; *Johnson v. McClary*, 131 Ind. 105; *Old Nat. Bank v. Heckman*, 148 Ind. 490.

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Manufacturing corporations, in this State, are governed by the same rules as individuals, and, although embarrassed or insolvent, may secure one or more creditors by mortgage, or otherwise, to the exclusion of all others, though equally meritorious. *Smith v. Wells Mfg. Co.*, 148 Ind. 333; *Henderson v. Indiana Trust Co.*, 143 Ind. 561; *Levering v. Bimel*, 146 Ind. 545, and authorities cited; *Sanford, etc., Co. v. Howe, etc., Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713.

It is important to note at this point that this court is fully committed to the doctrine that an insolvent manufacturing corporation does not hold its property in trust for its creditors, or subject to any lien, legal or equitable, in their favor, in any other manner than such property is held by an insolvent individual debtor. *First Nat. Bank v. Dovetail, etc., Co.*, 143 Ind. 534, 543; *Henderson v. Indiana Trust Co.*, *supra*; *Levering v. Bimel*, *supra*; *Smith v. Wells Mfg. Co.*, *supra*.

It has also been held that an insolvent foreign corporation may mortgage its lands in this State to secure a *bona fide* antecedent debt, where such action is not prohibited by the statutes of the foreign state. *Nathan v. Lee*, 152 Ind. 232, 43 L. R. A. 820. And this court has expressly decided that the fact that the debt is due to a director, or other officer, or that such director or officer is surety for its payment, does not deprive the corporation, although insolvent, of the right to prefer it. *Levering v. Bimel*, 146 Ind. 545, 554, 555, 556.

The rules which have been applied in such cases are exhaustively examined in *Levering v. Bimel*, *supra*, and the conclusions announced in that case are fortified by very full and satisfactory references to the leading text-books, and to the previous decisions of this court. That case covers the entire ground of the present controversy, excepting only the validity of a preference given to a director where the vote of the director himself is necessary to authorize the

execution of the mortgage or other instrument securing the debt.

Counsel for appellees do not deny the soundness of the principles laid down in the foregoing cases. They say: "We are aware of the fact that our court is in line with the federal courts, and the better considered cases in the state courts, in not adhering to the doctrine of the so-called trust-fund theory respecting the assets of insolvent corporations; and we admit that it is the settled law of Indiana that until the court, by its officers, takes charge of the property of an insolvent corporation, it has the same power and control over its property as an individual would have over his property, under like circumstances." But counsel say that "The sum and substance of our contention on this branch of the case is that the law will never permit a body of directors of an insolvent corporation to act as grantors for the corporation, in parceling out to themselves, as grantees, the assets of the corporation upon their unsecured claims, to the exclusion of other unsecured creditors. To permit this would be to violate the very spirit of equity. It is right that the directors of an insolvent corporation should have the power, so long as they retain dominion, to dispose of the assets, and prefer creditors to the same extent that a partnership or an individual can."

In deciding the question before us, it is to be borne in mind that a manufacturing corporation, under the statutes of this State, is strictly a private association, organized and conducted for private purposes only, enjoying no special privileges, and owing no duty to the public or to its creditors except such as is imposed by the terms of the statute under which it is formed, and by those general rules which apply to individuals engaged in business. Until its property passes into the custody of the law by seizure under proceedings in attachment, or by the appointment of an assignee, trustee, or receiver, the corporation may sell, transfer, pledge, or mortgage its property in the same manner

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and subject to the same restrictions only as apply to the case of a private person. Such property is in no respect held in trust for the creditors of the association. The law of this State gives them no lien or claim upon such property. They have no right to look to the corporation or its directors to protect their interests. They deal with it at arm's length, and their attitude is antagonistic to the association. When asked to extend credit to it, all persons dealing with the corporation know that if it is, or thereafter becomes, insolvent, the whole of its property may be applied to pay or secure debts due to favored creditors, including officers and directors, and that the claims of all other creditors may be excluded and consequently lost. If, with this knowledge, credit is given, it can not be said that preferences subsequently conferred upon other creditors have violated any right which the law gave to the creditor whose claim was left unpaid and unsecured.

No statute gives to a creditor the right to demand an equal distribution of the assets of an insolvent private manufacturing corporation among its creditors. The maxim that, in case of insolvency, equality is equity has not the force of a statute requiring such a distribution. It is applicable only when the principles of equity are brought to bear upon the distribution of property lawfully in the custody of a court, where such court possesses the authority to make distribution upon that basis. The directors of a manufacturing corporation are not the agents or trustees of the creditors, but are simply and solely the representatives of the stockholders and of the corporation. There is no sufficient legal reason why they should be denied the right of preference in the event that the corporation becomes insolvent. And even if the vote of the director himself is necessary to authorize the execution of the instrument creating the preference, no legal wrong is done to the other creditors where such preference is given. The association is a legal entity distinct from the stockholders

and from the directors. The action of the directors is their action, and not their individual act. The vote of a majority is required to pass any resolution or order, but the action of such majority is not necessarily vitiated by the fact that one or more of the persons composing it is interested in the passage of the resolution. The duty of the directors is to the corporation and its stockholders, not to the creditors. If the corporation or its stockholders acquiesce in the disposition of the corporate assets made by the directors, and if such disposition is the payment of a just debt owing by the corporation, no matter to whom, it is difficult to perceive upon what legal ground a creditor can call such act in question. When it is understood that no trust exists in favor of creditors, that the directors are the agents of the stockholders and of the corporation only, and that they owe no special duty to the creditors of the company, it seems plain that, where the right to give preferences is recognized, the directors of an insolvent corporation may secure a *bona fide* debt owing to one of their own number.

As we have stated, it is established law in this State that an insolvent corporation may give preferences to the same extent and in like manner as an individual. In such transactions the corporation and its stockholders are the principal, the directors are their agents. If the vote of the director whose debt is secured is necessary to pass the resolution creating the preference, the only persons sustaining such relations to him as authorize them to object to his act are the stockholders and the corporation itself. The general rules governing the rights and duties of principal and agent apply in cases of this kind. The agent of a private person authorized to sell property may sell and convey to himself. Such sale is voidable, but not void. If his principal does not object within a reasonable time, or with full knowledge ratifies the sale, it will stand. We have been referred to no case in which it has been held that where such sale is made in good faith, and for a fair and sufficient

consideration, the creditors of the principal can avoid it on the ground of a violation of duty by the agent. *Fountain Coal Co. v. Phelps*, 95 Ind. 271; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178, 22 L. Ed. 482; *Eastern Bank v. Taylor*, 41 Ala. 93, 100.

The rule is that where the principal affirms the act of an agent a stranger will not be permitted to controvert it. *Scott v. Detroit, etc., Soc.*, 1 Doug. (Mich.) 119. "As the principal or parties interested may confirm the sale, a 'mere stranger' can not make the objection that the trustee was the purchaser; or that the sale was irregular." Dillon, J., in *Buell v. Buckingham & Co.*, 16 Iowa 284, 85 Am. Dec. 516.

Two of the special findings of fact are in these words: "That the said directors were sureties or otherwise legally bound on all the indebtedness of the said canning company, and, desiring to secure themselves from such liability, they caused said canning company, at a meeting called for that purpose, to execute the following instrument in writing, to wit: [Here follows the mortgage or deed of trust to Mosiman.] That the claims mentioned in said trust deed were just and *bona fide* debts of said canning company, and said trust deed was executed by authority of the entire board of directors of the said canning company."

Did the fact that the directors were sureties, or otherwise legally bound for their payment, put it out of the power of the board of directors to secure the payment of these debts? The later and better authorities require us to answer this question in the negative. It was said in *Levering v. Bimel*, 146 Ind. 545, that the effect of the decisions referred to in the opinion was that an insolvent corporation is not to be denied the right to prefer a creditor or creditors, even where such preference inures to the benefit of its officers who are sureties upon the claims of the creditors preferred. And the court further declared that the broad doctrine that the officers of a corporation can not contract with it in their

own names is unreasonable, and that the fact that the officer of the corporation would be enabled by reason of his position to outstrip the other creditors in the race of diligence in collecting or securing the claims upon which they were liable was not sufficient to deprive the corporation of the right to prefer such claims.

The courts holding that an interested director can not vote, or even be counted for the purpose of making a quorum, seem to have proceeded entirely upon the theory that the director was a trustee for or an agent of the creditors, and therefore could not be permitted to advance his own interests at the expense of his principal or the *cestui que trust*. The directors are the agents and trustees of the corporation and its stockholders. As a director of an insolvent corporation is not a trustee for its creditors, and owes them no duty, where the debt to which preference is given is an honest and just debt of the corporation, the circumstance that the director is incidentally benefited by such preference, does not, in our opinion, absolutely disqualify him to take part in the proceedings of the directors, or to vote upon the proposition to secure such debt. If the corporation and the stockholders acquiesce in the action of the director creditors, outside creditors, who are strangers to the corporation, and have no lien or claim upon its property, can not impeach the transaction.

In *Schufeldt v. Smith*, 131 Mo. 280, 31 S. W. 1039, 29 L. R. A. 830, 52 Am. St. 628, creditors of a corporation brought suit to set aside a deed of trust securing certain debts for which the directors were personally liable, two of which, amounting to \$14,000, were evidenced by the notes of James Walsh, the president of the corporation, which the corporation had assumed and agreed to pay. The resolution authorizing the execution of the deed of trust was passed by three directors, of whom Walsh was one. The trial court held the deed of trust void, but its decision was re-

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versed on appeal, the supreme court of Missouri holding that, as the debts were just, the preference was valid.

The facts upon which *Butler v. Harrison Mining Co.*, 139 Mo. 467, 41 S. W. 234, 61 Am. St. 464, was decided, were as follows: The corporation had but three stockholders, who were also its sole directors. The company owed them \$100,000, and four years after it ceased to be a going concern they caused all the property belonging to it to be transferred to themselves in payment of their debt. Suit was brought by a creditor to set aside the transfer, and the lower court held the deed void. But on appeal the supreme court said: "Can an insolvent corporation prefer its director creditors, in the disposition of its property, to the exclusion of the general non-director creditors, so long as the property of the corporation remains in its custody and possession, and the preference is made in good faith, to pay off and discharge honest obligations?" The court answered its question in the affirmative, and sustained the deed.

In *Garrett v. Burlington Plow Co.*, 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461, the court said that counsel "insist that the directors of an insolvent corporation can not take from it security, by mortgage or other conveyance creating a lien upon its property, even though given in good faith, and without fraud in the transaction. We are not prepared to admit this proposition. A creditor may accept payment or security from an insolvent debtor free from any claim of other creditors. A corporation may make payment of its debts, or give its property in security therefor, just as a natural person may do. If, therefore, a director holds the indebtedness of an insolvent corporation, he may take payment or security in a good faith and honest transaction. No reason can be given why a director who holds a valid debt against his corporation may not, though it be insolvent, in a fair and honest way, take its property in security."

In *Planters Bank v. Whittle*, 78 Va. 737, an insolvent corporation against which suits were pending for the ap-

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pointment of a receiver, for the purpose of securing certain notes on which the directors were accommodation indorsers, assigned as collateral security sundry bonds, constituting a valuable part of its assets. It was held that the assignment was valid if made in good faith.

The supreme court of Missouri, in *Foster v. Mullanphy, etc., Co.*, 92 Mo. 79, 4 S. W. 260, sustained the validity of a deed of trust given to secure debts owing to four of the directors, who voted for the resolution of the board authorizing the execution of the deed.

The right of a corporation in embarrassed or failing circumstances to prefer debts due to its directors, or for which they are liable as indorsers, sureties, or otherwise, has been upheld in many other cases, among which the following may be cited: *Warfield, etc., Co. v. Marshall County, etc., Co.*, 72 Iowa 666, 34 N. W. 467, 2 Am. St. 263; *Bank of Montreal v. Potts Salt, etc., Co.*, 90 Mich. 345, 51 N. W. 512; *Farmers, etc., Bank v. Wasson*, 48 Iowa 336, 30 Am. Rep. 398; *Central R., etc., Co. v. Claghorn*, 1 Speers' Eq. (S. C.) 545; *Garrett v. Burlington Plow Co.*, 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Sargent v. Webster*, 13 Met. (Mass.) 497, 46 Am. Dec. 743. In the latter case it was said by Shaw, C. J.: "In the first place, it is very clear that the plaintiff, Sargent, though a member of the corporation, had a right to deal with them as with a person and body politic. He could take security or attach property, or take any other measure that another creditor could; and though he might be liable, in a qualified way, for the debts of the corporation, it was a special liability created by statute, and one which can be enforced only in the mode provided by statute."

Our conclusion, therefore, upon the reasons and authorities herein set out, is that the deed of trust executed by the Nappanee Canning Company to Mosiman, as trustee, to secure, among others, debts for which the directors of that

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company were liable, was valid, and enforceable against the property described in it.

The findings of the court to the effect that the execution of the trust deed rendered it impossible for the appellee Reid, Murdoch & Co. to recover and collect damages for the breach of their contract with the canning company; that the directors intended to shield themselves from further liability, to indemnify themselves against loss, and to obtain the benefit of the advance in the price of the goods sold to the appellee; and that the trust deed is fraudulent as to each of the directors beneficially interested therein,—are wholly unimportant. The directors had a right to cause the deed of trust to be made to secure themselves against loss. As it included all the property of the company, its necessary effect was to render it impossible for the appellee to collect any claim held by it out of the property of the corporation. And no facts are found which establish fraud. *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696. It was not a fraud for the directors to do what they had a legal right to do, nor was the deed rendered fraudulent by the consequences of loss to the appellee Reid, Murdoch & Co. which may have resulted from it. The facts found sustain the conclusion of the court that the appellee Reid, Murdoch & Co. was entitled to recover from the Nappanee Canning Company \$1,100 as damages, and there was evidence to support the finding.

The judgment that the appellee Reid, Murdoch & Co. recover from the Nappanee Canning Company \$1,100, and costs in that behalf only, is affirmed. The judgment that the mortgage or deed of trust, executed by the Nappanee Canning Company to Mosiman, as trustee, is void as to Francis E. Berlin, Barney Uline, Frank Coppes, Tobias Hartman, Henry Wysong, Jacob H. Whisler, Joseph S. Arney, John W. Albin, Ephraim Emmert, Coppes Bros. & Co., and the Farmers & Traders Bank, is reversed, with

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directions to the court to restate its second conclusion of law in accordance with this opinion, and to render judgment in favor of the said appellants, sustaining said mortgage or deed of trust; and the judgment in favor of the said City National Bank of Goshen, Isaac Blumberg, George Searer, George Barber, M. H. Mittenthal, as guardian, sustaining said mortgage or deed of trust, is hereby affirmed.

DISSENTING OPINION.

HADLEY, J.—It is conceded that this court has adopted the rule that a corporation, while prosecuting its corporate business, though with liabilities greater than assets, may prefer its creditors, as may a natural person, and that such preference may extend to an officer or director of the corporation when conferred by the vote of a disinterested majority of the board of directors. I am impressed, however, after a thoughtful consideration of the subject, that the rule has been already carried in this State as far as reason and judicial precedent will warrant, and, in so far as it is held in the majority opinion in the case at bar that the directors of an insolvent corporation, in contemplation of its early dissolution, may appropriate the entire assets of the corporation to the exclusive security of their own preëxisting personal liabilities, I am unable to agree with my brethren, and am constrained to enter my earnest protest.

The holding is a step in advance of any previous ruling of this court, is forbidden by the decided weight of authority, as I shall endeavor to show, and invests corporation directors with such temptations and powers for mischief and moral wrong that, if no other reason existed, it should be denied on the ground of public policy. In support of this view I am not driven to what is commonly called the trust-fund doctrine, that is, to a line of decision to the effect that upon insolvency equity seizes the assets of a corporation for equal distribution to the creditors,—and no preference can

be given to any one. This latter doctrine has been repudiated in this and in most other states of the Union to the extent of recognizing the right of insolvent corporations to prefer their common, unofficial creditors to the same extent, and by the same modes, that an insolvent individual may prefer his. But as to official or director creditors, it is quite as generally held that their position as managing agents gives them such an unequal and unfair advantage over other creditors that they will not be permitted by courts of chancery to profit by their superior knowledge and position in a race of diligence.

The position occupied by directors is one of trust, call it what we may. They receive the property of others, act for others, and are accountable to others. They are bound to devote the property entrusted to them exclusively to the purposes of the corporation. Any departure in this is a misappropriation for which they are answerable to the stockholders or the creditors. The assets not being their own, they hold and administer them primarily, for the benefit of the stockholders, secondarily, for the use of those who may by contract or operation of law succeed to the interests of the stockholders. While the corporation is solvent, the active fiduciary relation is between the directors and the stockholders, who are the real parties in interest. When insolvency occurs the stockholders, while retaining the legal title, by force of law, part with all beneficial interest in the assets, and the same is transferred to the creditors. The possession and control of the directors being unchanged by the advent of insolvency they thereafter necessarily hold the property, not for themselves, but in trust for the creditors who now have the exclusive interest. It at once becomes their duty to apply the assets to the payment of the debts; not necessarily *pro rata*, because the creditors have no mutual relation among themselves; but they hold the assets in trust for application to the debts, either *pro rata* or preferentially, as they themselves deem the merits

of the creditors to be. The directors, being the corporation for the purpose of judging among the creditors, can not select themselves from among the creditors for preference, because they can not be both judges and creditors at the same time. It seems absurd to say that the same persons may constitute different identities of themselves, so that, as directors of a corporation, they may convey, or mortgage, or contract, with themselves as private persons. The relation of debtor and creditor implies antagonism,—a counter-vailing interest of distinct and independent parties. The interests of self-preferring creditors are coöperative and the same. The more anxious as a creditor to obtain the preference, the more willing and ready as a debtor to grant it. This puts the director in a situation wholly incompatible with his duty to serve all stockholders and creditors fairly and alike. While not a trustee in a technical sense, there can be no doubt that he occupies such a fiduciary position towards the stockholders and creditors as calls for a faithful performance of duty, and conduct entirely free from any use of his position to advance his personal interests beyond those of others of equal merit. We have many American decisions in support of this view, from the more recent of which in the several states, though often not the best considered, I briefly quote: "It seems to be well settled that directors of an insolvent corporation, who are creditors of the company, can not secure to themselves any preference or advantage over other creditors in the payment of their claims." *Bonney v. Tilley*, 109 Cal. 346, 42 Pac. 439, quoted approvingly in *Merced Bank v. Ivett*, 127 Cal. 134, 59 Pac. 393, decided December 11, 1899. "It is not good morals, or good law." *Fishel v. Goddard* (Col.), 69 Pac. 607, 612. (July 5, 1902.) "We think it very clear, therefore, that when the validity of these mortgages, to secure debts upon which the directors were indorsers, was questioned by other creditors of the corporation, they should have been classed as instruments rendered void by the legal

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principle which prevents directors of an insolvent corporation from giving themselves a preference over outside creditors." *Atlas Tack Co. v. Exchange Bank*, 111 Ga. 703 710, 36 S. E. 939. (August 7, 1900.) "The law is, however, that an insolvent corporation can not prefer a creditor who at the time is a director therein." *Rockford, etc., Co. v. Standard, etc., Co.*, 175 Ill. 89, 51 N. E. 642, 67 Am. St. 205. (October 24, 1898.)

"In *Hays v. Citizens Bank*, 51 Kan. 535, 33 Pac. 318, it was held that the directors and managers of a corporation, who were creditors of the same, could not prefer themselves, leaving the question undecided as to whether other creditors might be preferred. The ground of that decision is that the directors are the agents of the stockholders and creditors, and that their interests as creditors would be inimical to their duties as agents. They occupy a fiduciary relation to the creditors and stockholders and may not take advantage of their superior information and opportunity to gain an advantage over those whose interests they are guarding; nor are they permitted to contract with themselves as they may with third parties." *Grand, etc., Co. v. Rude Bros. Mfg. Co.*, 60 Kan. 145, 150, 55 Pac. 848. (1899.) "Officers of a corporation, who are also its creditors, can not lawfully pay their own claims in preference to other creditors, when the corporation is insolvent." Head-note 2, *James Clark Co. v. Colton*, 91 Md. 195, 46 Atl. 386, 49 L. R. A. 698. (1900.)

"The directors of an insolvent corporation, being its creditors, can not take advantage 'of their fiduciary relation, and deal directly with themselves, to the injury of others in equal right. If they do, equity will set aside the transaction, at the suit of creditors of the corporation or their representatives, without reference to the question of any actual fraudulent intent on the part of the directors; for the right of the creditors does not depend upon fraud in fact but upon the violation of the fiduciary relation of the directors.'"

Taylor v. Fanning (Minn.), 91 N. W. 269. (July 3, 1902.)

"At common law a debtor may prefer a creditor to the exclusion of others—but a different rule prevails when the creditor is a director of an insolvent corporation debtor. The directors in such case are not strictly trustees for the general creditors, though sometimes so called,—but they owe them a duty, which is inconsistent with the taking of a security for prior indebtedness to their detriment." *Symonds v. Lewis*, 94 Me. 501, 48 Atl. 121. (1901.)

"The corporation was plainly insolvent, not a going concern, nor one with any prospect of going on at any time in the future. It could not in such condition prefer its directors, secretary and treasurer." *King v. Wooldridge*, 78 Miss. 179, 28 South. 824. (October, 1900.) "The proposition that an insolvent corporation can not prefer a debt on which its officers and directors are bound as sureties is now thoroughly established in this state." *Williams v. Turner* (Neb.), 88 N. W. 668. (January 8, 1902.) "The law will not allow the stockholders and officers of the corporation to take advantage of their knowledge of the insolvent condition of the concern, and their power to *use and control the assets*, to pay their own debts, or to relieve them from special liabilities to the injury of other creditors. *Graham v. Carr*, 130 N. C. 271, 41 S. E. 379. (May 6, 1902.)

"The law applicable to these cases is extremely clear. While directors of corporations are not trustees in a technical sense, there is yet no doubt that they occupy a fiduciary position towards stockholders and creditors of the corporation, and that they come within the designation of persons filling a fiduciary relationship. In fact, they hold a position of the highest trust, and will therefore be required to execute it with the utmost fidelity. This being so, it is plain that the defendants could not use their official position to advance their individual interests. But this is precisely what they did, that is, with actual knowledge that the

corporation was insolvent." *Smith v. Putnam*, 61 N. H. 632. (1882.)

"The receiver of an insolvent corporation may recover its assets withdrawn after it has become insolvent in order to secure some of its directors against a liability incurred for the corporation. A preference of that character can not stand, although at the time it is given there is no statutory prohibition against it." Head note, *Taylor v. Gray*, 59 N. J. Eq. 621, 44 Atl. 668. (November 22, 1899.)

"It is the settled law of this commonwealth, that an insolvent debtor, whether corporation or individual, may prefer *bona fide* creditors; but if the creditor benefited be a director or other officer possessed of corporate power and corporate knowledge of the insolvency of his corporation, then he has an advantage over other creditors whose claims may be of equal merit; he has knowledge that his debt is in peril, and has the power to prefer himself. As he is in a sense trustee for all the stockholders and creditors, equity forbids that he should act solely for himself, regardless of the interests of those for whom he is trustee." *Mueller v. Monongahela, etc., Co.*, 183 Pa. St. 450, 458, 38 Atl. 1909. (1898.)

"The directors of an insolvent corporation are by virtue of their position debarred from preferring debts of the corporation due to themselves." Head note, *Olney v. Conanicut Land Co.*, 16 R. I. 597, 18 Atl. 181, 5 L. R. A. 361, 27 Am. St. 767. (August 10, 1889.)

"When a corporation is insolvent and has ceased to be a going concern, and its officers know, or ought to know, that suspension is impending, then such officers are so far trustees that they may not transfer corporate property to themselves in payment of debts due them, and that such a transfer constitutes a fraud in law." *Slack v. Northwestern Nat. Bank*, 103 Wis. 57, 64, 79 N. W. 51, 74 Am. St. 841. (April 25, 1899.) Of same import, see *Burnham, etc., Co. v. McCornick*, 18 Utah 42, 55 Pac. 77. (October 22, 1898.) To the same effect, see *Harding v.*

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Hart, 51 C. C. A. 264, 113 Fed. 304, 342. (January 7, 1902.) *Kittel v. Augusta, etc., R. Co.*, 78 Fed. 855. (February 22, 1897.) *Northwestern, etc., Ins. Co. v. Cotton, etc., Co.*, 70 Fed. 155. (October 21, 1895.) *Bosworth v. Jacksonville Nat. Bank*, 12 C. C. A. 331, 64 Fed. 615. (November 27, 1894.) *Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 320, 63 Fed. 496. (October 1, 1894.) *Consolidated, etc., Co. v. Kansas City, etc., Co.*, 43 Fed. 204. (September 5, 1890.)

It is not clear how *Sanford, etc., Co. v. Howe, etc., Co.*, 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713, lends any support to the proposition that directors, or a majority of the board of directors, may prefer themselves by appropriating all the corporate assets on preëxisting liabilities, after they have determined that the corporation is hopelessly insolvent, and will in a few days abandon its corporate business. In that case Justice Brewer rests the court's ruling upon the fact that the stockholders expressly, by vote, authorized the mortgage, and that at the time it was executed the corporation was a going concern, and intended to continue in business, and in fact did continue, and paid out \$30,000 on its obligations, other than those secured, in the usual course of business; and it was also at the time believed by all parties to be solvent, and was in fact solvent if the assets were worth as much as they cost. The trend of the decision is indicated by the following sentence, at page 317: "It is often said that directors may not take advantage of their position and power to secure personal advantage to themselves, but that proposition has no application here, for the corporation itself directed this mortgage." To the same effect, see, also, the following text-writers: Cook, Corp. (4th ed.), §692; Elliott, Priv. Corp. (3d ed.), §189; Field, Corp., §174; Rees, Ultra Vires, §155; Spelling, Priv. Corp., §713; Taylor, Priv. Corp. (4th ed.), §759; Thompson, Corp., §§6503, 8496; Morawetz, Priv.

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Corp. (4th ed.), §787; Clark & Marshall, Priv. Corp., 2414.

Arkansas, Ohio, Massachusetts, New York, and a number of other states, have statutes restricting the right of insolvents to prefer any creditor. Tennessee, Texas, Washington, South Dakota, and perhaps some other states, seem to adhere to the trust-fund doctrine.

It has always been the rule that the holder of a secret equity shall not assert it to the injury of one who has been innocently misled thereby, and in what way is the principle different, when the directing agents of an insolvent corporation, with that full knowledge of the financial condition of the concern the law requires them to have, continue to conduct the business, keep the public records fair, invite public confidence, solicit the people to deal with them, and thus go on under cover, speculating on the capital fund of the association, until it has been wasted to a point that will only secure their personal liabilities, then, under claim of acting for the corporation, deliver to themselves, as creditors, all that is left of the assets? I am mistaken if the deception of the one is not as culpable as the other, and if the conduct of the latter does not violate the principles of common honesty.

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[No. 19,716. Filed January 8, 1908.]

APPEAL.—*Joint Assignment of Error.*—A joint assignment of error, as to the action of the court in sustaining demurrers to two paragraphs of complaint, presents no question if either paragraph is bad. p. 637.

JUDGMENT.—*Review.*—*Complaint.*—In a suit to review a judgment rendered against plaintiffs in an injunction proceeding, a complaint which states none of the facts upon which the complaint for injunction rested, nor any fact from which the court deduced

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its conclusions of law, and refused a new trial, is not sufficient on demurrer. pp. 638, 639.

From Huntington Circuit Court; *J. W. Adair*, Special Judge.

Suit by Thomas H. Hague and others against the First National Bank of Huntington. From a judgment for defendant, plaintiffs appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

M. L. Spencer, W. A. Branyan and H. B. Spencer, for appellants.

R. A. Kaufman, O. W. Whitelock and S. E. Cook, for appellee.

HADLEY, C. J.—Appellants brought this action to review a judgment obtained against them by the appellee. The amended complaint is in two paragraphs, to each of which the appellee demurred separately and severally. The demurrer was sustained to each paragraph of the amended complaint and appellants excepted.

The only assignment of error is in these words: "The court erred in sustaining the demurrer to the amended complaint." This assignment assails collectively the separate and distinct rulings of the court on the demurrer to each of the two paragraphs of the amended complaint, and under the well established rule in this State the assignment must fail unless valid as to both. *Noe v. Roll*, 134 Ind. 115; *Black v. Thompson*, 136 Ind. 611; *Dorsett v. City of Greencastle*, 141 Ind. 38; *Moore v. Morris*, 142 Ind. 354; *Saunders v. Montgomery*, 143 Ind. 185.

The substance of the first paragraph is as follows: That on August 28, 1898, the defendant, the First National Bank of Huntington, filed in this court its complaint against these plaintiffs for an injunction forbidding the plaintiffs from tearing down, or in any way interfering with a certain building situate on land therein described. A summons was duly issued and served on the plaintiffs,

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whereupon they appeared to the action, filed their answer in general denial, and the cause was then submitted to the court for trial. The court, upon request, made a special finding of facts, and stated its conclusion of law thereon in favor of the bank, to the effect that it was entitled to a perpetual injunction restraining the defendants—these plaintiffs—from interfering with the building described in the complaint, which conclusion of law was erroneous upon the facts found, and the plaintiffs excepted thereto at the time, but the exception was overruled, and the court rendered judgment against these plaintiffs in accordance therewith; whereupon these plaintiffs moved the court to modify said judgment so as to limit the time of the injunction to six months within which the bank should remove said building to its own land, but the motion was overruled, and these plaintiffs at the time excepted. These plaintiffs then moved the court for a new trial for reasons stated in the motion, which motion was overruled, and these plaintiffs excepted. The evidence is all brought into the record by a bill of exceptions duly signed, certified, and filed within the time allowed, a copy of which record and proceedings, duly certified, is filed. That there is manifest error, in this, namely: (1) The court erred in its conclusion of law; (2) the court erred in overruling the motion to modify the judgment; (3) the court erred in overruling the motion for a new trial. Wherefore the plaintiffs pray, etc.

A complaint for review of a judgment stands upon the same footing as the complaint in all other causes. To be sufficient it is essential that it exhibit a good cause of action; that is, show upon its face some prejudicial error of the court in the former trial, to which exception was properly taken and reserved. Accordingly, to constitute a valid complaint for review, enough of the issuable facts of the former case to show the grounds, effect, and limitation of the rulings complained of must be set out in the complaint, together with the nature of the rulings and exceptions, so that

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the court may be able to see from the body of the complaint itself, and without referring to exhibits filed therewith, that the plaintiff is entitled to relief against an error that has been committed by the court against him. *Murphy v. Branaman*, 156 Ind. 77; *Wabash R. Co. v. Young*, 154 Ind. 24; *State, ex rel., v. Wills*, 26 Ind. App. 329.

Tested by these principles, the first paragraph of the amended complaint was wholly bad. Not a fact upon which the complaint for injunction rested, is stated; nor a fact from which the court deduced its conclusion of law, and refused appellants a new trial, is set forth in this paragraph of the complaint, and it is very clear that the demurrer thereto was properly sustained.

It follows that the judgment should be affirmed. Judgment affirmed.

KIRKPATRICK CONSTRUCTION COMPANY v. CENTRAL ELECTRIC COMPANY ET AL.

[No. 19,989. Filed January 8, 1903.]

PROCESS.—Summons.—Jurisdiction.—Corporations.—A summons issued and served upon the president and secretary of a corporation in their individual capacity did not give the court jurisdiction of the corporation. pp. 642, 643.

APPEARANCE.—Jurisdiction.—Corporations.—Where the attorney of a corporation in an action against the corporation acknowledged service of notice to take depositions, was present in court at the publication of the depositions and made no objection thereto, was present when a continuance was requested by plaintiff, and stated that it did not matter when it was tried, that plaintiff could have all the time it desired so far as he was concerned, whereupon such cause was continued as by agreement, such action on the part of the attorney amounted to an appearance. p. 643.

SAME.—Agreement to Continuance.—An agreement by defendant's attorney to a continuance constitutes an appearance. p. 644.

From Hancock Circuit Court; *E. W. Felt*, Judge.

Suit by the Kirkpatrick Construction Company against the Central Electric Company and others to set aside a judgment rendered against plaintiff by a justice of the

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peace. From a judgment for defendants, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

E. J. Binford and *A. H. Brier*, for appellant.

G. W. Duncan, *Ephraim Marsh* and *W. W. Cook*, for appellees.

MONKS, J.—This action was brought by appellant against appellees to have a judgment rendered by a justice of the peace in favor of the Central Electric Company against appellant adjudged null and void and to enjoin its enforcement. The cause was tried by the court, a special finding of facts made, and conclusions of law stated thereon against appellant. The judgment followed the conclusions of law.

It appears from the special finding that the Central Electric Company, by its attorney, on March 6, 1901, filed a complaint before Vinton A. Smith, a justice of the peace of Center township, Hancock county, Indiana, against appellant, a corporation organized under the laws of this State, whose principal office was in said Center township, demanding a judgment on account for \$100 for goods, wares, and merchandise sold and delivered by said Central Electric Company to appellant at its special instance and request; that thereupon said justice of the peace, on March 6, 1901, issued a summons for Christian Kirkpatrick and Elmer J. Binford to appear before him at his office on March 15, 1901, at nine o'clock in the forenoon to answer the complaint of said Central Electric Company, wherein the sum of \$100 was demanded. This summons, which was the only one issued in said cause, was served the same day by a constable of said township upon said Kirkpatrick and Binford by reading, and returned to said justice of the peace. Afterwards, on the same day, the Central Electric Company, by its attorney, served a notice to take depositions on behalf of said company in said cause on said Elmer J.

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Binford, who, in writing, acknowledged service thereof, and waived dedimus and certificate of official character of the officer before whom the same were to be taken, signing his name thereto, "Elmer J. Binford, attorney for defendant;" that the cause of action was entitled in said notice "Central Electric Company v. The Kirkpatrick Construction Company." Said depositions were taken, pursuant to said notices, on March 11, 1901, and afterwards filed in the office of said justice of the peace. Afterwards, on March 15, 1901, a like notice was given by the plaintiff in said cause, and service thereof acknowledged in like manner and character by said Binford. Said Kirkpatrick Construction Company was not present, and took no part in the taking of any of said depositions..

After the first mentioned notice to take depositions was served, and before the day set for the trial of said cause, the attorney for the Central Electric Company, at the office of the justice of the peace before whom said cause was pending, stated to said justice, and said Binford, who was present, that he desired to publish said depositions, and handed them to said Binford for inspection and examination. Binford inspected the package and envelope containing said depositions, and made no objections to the publication thereof. Said depositions were, thereupon, on motion of the attorney for the plaintiff in said cause, published, and the envelope containing the same torn open in the presence of said justice and said Binford. Afterwards, on March 15, 1901, at nine o'clock a. m., being the day and hour set for the trial of said cause, said justice of the peace stated, in the presence of said Binford, that Mr. Duncan, the attorney of the Central Electric Company, who was present, desired a continuance of said action, and said Binford thereupon said that it did not matter when it was tried, and that said Duncan could have all the time he desired, so far as he was concerned; that the justice of the peace entered in his docket

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in said cause that the plaintiff appeared by George W. Duncan, its attorney, and the defendant by Elmer J. Binford, its attorney, and by agreement said cause was continued until March 22, 1901, at nine o'clock a. m. No motion or affidavit was filed by the plaintiff for such continuance. Afterwards the case was, by said justice, continued until April 17, 1901, at nine o'clock a. m. On the day and hour last named the plaintiff in said cause appeared by attorney, and the defendant, failing to appear, was called and defaulted, and judgment rendered against it for \$32.11 and cost.

Said Elmer J. Binford was, at the commencement of said action before said justice of the peace, and at all times since has been, the secretary of the Kirkpatrick Construction Company, and also its general counsel and attorney. Said Binford was a regular, practicing attorney at the bar of the circuit court of Hancock county during all of said time; that said Christian M. Kirkpatrick was at the time of the commencement of said action, and at all times since has been, the president of said corporation. No answer, or other paper or pleading was filed in said cause by the Kirkpatrick Construction Company, nor was anything done by anyone for or on behalf of said construction company, except as above stated.

Upon the facts found, the trial court adjudged that the judgment rendered against appellant by the justice of the peace, was not null and void, and final judgment was rendered against appellant for cost.

Jurisdiction of the person of a defendant can be acquired only by the issuing of a summons against such defendant and the service thereof by some of the modes provided by statute, or by his voluntary appearance in court in person or by attorney, and submitting to the authority of the court. *Paulus v. Latta*, 93 Ind. 34, 41.

The only summons issued by the justice of the peace was against Kirkpatrick and Binford as individuals, and the

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service thereof on the persons named did not give the justice any jurisdiction over the Kirkpatrick Construction Company. *Vogel v. Brown Tp.*, 112 Ind. 299, 2 Am. St. 187; *Cicero School Tp. v. Chicago Nat. Bank*, 127 Ind. 79, 80.

To constitute an appearance so as to give jurisdiction over the person of a defendant in this State, there must be some formal entry, plea, motion, or act, or word spoken in said cause in court which should be shown and determined by the record. *Rhoades v. Delaney*, 50 Ind. 468, 471; *McCormack v. First Nat. Bank*, 53 Ind. 466, 471, and cases cited. What was said by Binford, the general counsel and attorney for the appellant, who was the defendant in the cause before the justice of the peace on March 15, 1901, as shown by the special finding, was clearly an appearance for the defendant in said action under the rule above stated. His acts and words were such, in regard to the continuance of the cause, that the justice continued the same without any motion or affidavit on the part of the plaintiff therefor, by agreement of the parties.

Appellant insists that, as Binford was served as an individual in said cause, we must presume that what he said and did before the justice of the peace was in the capacity in which he was summoned, and not as attorney for defendant in that cause. He had, however, after he was served with said summons, as the special finding shows, signed an acknowledgment of service of a notice to take depositions in said cause "as attorney for defendant," the notice showing that the action was that of the Central Electric Company v. The Kirkpatrick Construction Company. He was present before the justice when these depositions were published, and examined the envelopes containing the same. Under such circumstances, he was bound to know who were the plaintiff and defendant in said action, and it can not be said that he did not know that the action in which the agreement to continue was entered was against appellant.

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It is not claimed that he had no authority to appear for the defendant in said action, but that a mere agreement to a continuance is not an appearance. This court has held otherwise in *Cox v. Pruitt*, 25 Ind. 90, and *Smith v. Jeffries*, 25 Ind. 376.

It follows that the court did not err in its conclusion of law. Judgment affirmed.

DAVIS v. BROWN, ADMINISTRATOR.

[No. 19,998. Filed January 9, 1908.]

INSURANCE.—Assignment of Policy.—Insurable Interest.—The fact that a person who has in good faith procured a policy of insurance upon his own life in favor of his estate assigns it to another, who has no insurable interest in his life, will not prevent a recovery by the latter upon the maturity of the policy. pp. 646-648.

SAME.—Assignment of Policy.—Complaint by Assignee.—Pleading.—A complaint by the assignee of a life insurance policy need not anticipate and negative the defense that the assignment was a part of a transaction that contravenes public policy. pp. 649, 650.

SAME.—Assignment of Policy.—The provision of §4914h Burns 1901 that the assignment of an insurance policy to one having no insurable interest in the life of the insured, except as security for a debt, with remainder over to the beneficiary or to the estate of the insured, shall render such policy void, does not apply to foreign companies. p. 650.

APPEAL AND ERROR.—Pleading.—Harmless Error.—In an action on an insurance policy by the administrator of the insured, error in sustaining a demurrer to a cross-complaint by one claiming the policy as assignee was prejudicial error, although the defense might have been made under the general denial; since cross-complainant was entitled to have the issues so formed that she could have recovered affirmatively under her cross-complaint. pp. 650, 651.

From Johnson Circuit Court; *W. J. Buckingham*, Judge.

Action by Samuel Brown, administrator of the estate of Florence O. McClain, deceased, against the Metropolitan Life Insurance Company and Susan Davis on an insurance policy. The company paid the amount of insurance into court and was discharged. Defendant Susan Davis filed a cross-complaint claiming the policy as assignee. From a judgment against her on demurrer to

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cross-complaint, she appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Reversed.*

R. L. Crawford, W. E. Deupree and L. E. Slack, for appellant.

E. L. Branigin and Thomas Williams, for appellee.

GILLET, J.—Appellee instituted this action against the Metropolitan Life Insurance Company on a policy of insurance issued to his decedent, Florence O. McClain. Said policy, as executed, was payable to the estate of said decedent upon her death. Appellant was made a party defendant to the action. The complaint alleged as to her that she claimed, but in fact had no interest in the policy. The company paid the amount of the insurance into court, and upon its written application, by way of interpleader, was discharged. Appellant filed answer to the complaint in three paragraphs, and also filed like number of paragraphs of cross-complaint against appellee. The first paragraph of answer was a general denial, but this paragraph was afterwards withdrawn. The other pleadings filed by appellant were adjudged insufficient on demurrer. There was a final judgment on the cross-complaint, based on the sustaining of a demurrer thereto, that appellant take nothing under her cross-complaint. Afterwards, in the main case, the cause was submitted to the court and a finding and judgment rendered for appellee. Proper assignments of error present the question whether the court erred in its rulings as to the sufficiency of such of appellant's pleadings as remain in the record.

The paragraphs of cross-complaint are founded on the theory that the assured had, in her lifetime, assigned said policy to appellant. The sufficiency of these paragraphs is questioned by appellee's counsel on the ground that they do not show that appellant, at the time of the assignment, had an insurable interest in the life of the assured. If the burden were on appellant to aver and prove such interest,

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it is clear that the first and second paragraphs of cross-complaint are insufficient, for they contain no averment on that subject. We think, too, that if such a showing were necessary, the third paragraph of cross-complaint would also stand condemned, for, although it avers many facts of an evidentiary character that might possibly bear on the purpose of the assignment, yet such facts are insufficiently connected by averment with the fact of the assignment, as considerations moving upon the minds of the parties in relation to the same, to render such facts pertinent in determining the sufficiency of such pleading. We will therefore assume that in the third, as well as in the other paragraphs of cross-complaint, there is an absence of any averment concerning the insurable interest of appellant in the life of the assured.

It is thoroughly settled that a person can not take out a policy in his own favor on the life of another unless the former has an insurable interest in the latter's life. *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185; *Elkhart, etc., Assn. v. Houghton*, 103 Ind. 286, 53 Am. Rep. 514; *Amick v. Butler*, 111 Ind. 578, 60 Am. Rep. 722; *Burton v. Connecticut, etc., Ins. Co.*, 119 Ind. 207, 12 Am. St. 405. This proposition, however, is not applicable to the case before us, for it is alleged that the decedent took out the policy of insurance, and had it made payable to her estate upon her death, and that she afterwards assigned said policy to the appellant. A person undoubtedly has an insurable interest in his own life, and, at least where he pays the premiums, it is immaterial, so far as the validity of the policy is concerned, that he designates a mere stranger to receive the benefit. *Elkhart, etc., Assn. v. Houghton, supra*; *Amick v. Butler, supra*; *Burton v. Connecticut, etc., Ins. Co., supra*; *Milner v. Bowman*, 119 Ind. 448, 5 L. R. A. 95. It is equally clear that the mere fact that a person

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who has effected an insurance upon his own life in favor of his estate assigns the policy to another, who has no insurable interest in his life, will not prevent a recovery by the latter upon the maturity of the policy.

In *Amick v. Butler*, *supra*, this court said, speaking by Mitchell, J.: "It has never been seriously questioned but that a person may insure his own life, and by the terms of the policy appoint another to receive the money upon the event of the death of the person whose life is insured; or, having taken a policy, valid in its inception, that he may in good faith assign his interest in such policy, as in any other chose in action. *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Ashley v. Ashley*, 3 Sim. 149; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496. See, also, note to *Clark v. Allen*, *supra*, 17 Am. Law Reg. 86; *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591; *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542; *Eckel v. Renner*, 41 Ohio St. 232. In either case the essential point is that the transaction be *bona fide*, and not merely a cover for obtaining wagering or merely speculative insurance, and a device to evade the law. *Provident, etc., Co. v. Baum*, 29 Ind. 236; *Olmstead v. Keyes*, 85 N. Y. 593; *Campbell v. New England M. L. Ins. Co.*, 98 Mass. 381; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Murphy v. Red*, 35 Alb. Law Jour. 490; *Cunningham v. Smith*, 70 Pa. St. 450. The cases which hold invalid the taking or assignment of insurance policies turn upon the fact that in each case the transaction was found to be merely colorable, and a scheme to obtain speculative insurance. *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Cammack v. Lewis*, 15 Wall. 643; *Warnock v. Davis*, 104 U. S. 775."

The statements that we have quoted find full support in the prior case of *Elkhart, etc., Assn. v. Houghton*, 103 Ind.

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286, 53 Am. Rep. 514. These cases do not rest, as appellee's counsel state, upon the fact that the actions were based on benefit certificates, instead of the ordinary forms of life insurance policies. While there may be a difference in the extent of the power of the assured to change the beneficiary between the one case and the other, as pointed out in *Mason v. Mason*, 160 Ind. —, yet there is in both cases the same salutary check against wagering upon human life. In fact it was expressly declared in *Elkhart, etc., Assn. v. Houghton*, 103 Ind. 286, 53 Am. Rep. 514, that the rules of law are the same in both cases, so far as concerns any question involved in that case.

The later cases that we have cited are not out of accord with *Franklin Life Ins. Co. v. Hazzard, supra*, and *Franklin Life Ins. Co. v. Sefton, supra*. Although the two cases mentioned were cases where there had been an assignment of valid insurance to a third person, yet in each of those cases the fact appeared, or was in effect charged, that the person taking the assignment had engaged in a speculation as to the length of time that the person whose life was insured would continue in life. This court is still of the opinion that such a transaction is quite as obnoxious to public policy as where a third person, without an insurable interest, effects an insurance for his own benefit upon the life of another. But there can not be an objection to a third person taking an assignment of a life insurance policy that another has taken out upon his own life where the insured has covenanted with the insurance company to pay the premiums, and where it is not contemplated that such third person will pay them. There may also be cases where an assignment would be valid that is not within these limitations. It is not our duty to anticipate what transactions of this character would be upheld by this court, but it is not presumptuous to state that it will not uphold such an assignment if it appears that it was a mere cover for a speculating risk contravening the general policy of the law.

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As the appellant might, by contract or gift, have become the owner of the chose in action in question, we proceed to consider whether the burden was on her to show that the transaction did not violate any rule of law. It was held in *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, that where a person takes out insurance for his own benefit on the life of another, the burden is on him to allege an insurable interest. The case cited has been followed on this point by *Burton v. Connecticut, etc., Ins. Co.*, 119 Ind. 207, 12 Am. St. 405, and *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. 380. We have no disposition to intimate a doubt as to the correctness of the rule stated, but we can not extend it to this case. In *Continental Ins. Co. v. Volger, supra*, it is said that it was held in the case of *Guardian, etc., Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180, that where the policy was procured by one on his own life for the benefit of another, it is not necessary in a suit by the beneficiary to aver an insurable interest; and this view, the Volger case declares, is in harmony with *Provident, etc., Co. v. Baum*, 29 Ind. 236.

The case of *Franklin Life Ins. Co. v. Sefton, supra*, throws a little light on the question in hand. In that case the company sought to defeat the suit of the administrator of the assured by pleading an assignment of the policy, made by the assured in his lifetime to another, with the consent of the company. The plaintiff replied admitting the assignment and the consent of the company thereto, but alleged a want of insurable interest in the assignee. Now it is evident that, notwithstanding the fact that the matter of avoidance was stated as a conclusion, the reply was sufficient, if the answer was bad; but this court said, in condemning the reply: "Had the pleading alleged that Hazzard had no interest in the life of Cone it would probably have been sufficient," and then stated that it was doubtful whether the judgment should be reversed on the

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ground that the reply was insufficient, because it appeared from the whole record that the appellant was not injured.

It is a rule of common-law pleading, subject, however, to some limitations and exceptions not necessary to notice here, that if a pleading makes out a *prima facie* cause of action or defense, the pleader is not required to notice and remove every possible exception, answer, or objection. 1 Chitty, Pleading (14th Am. ed.), *222. The pleadings in question count upon a transfer of the policy by the assured to appellant. The right of an assured holding a policy upon his life to name a beneficiary is unrestricted, in so far as the law is concerned. That which is condemned is not the naming of a new beneficiary, but the wagering transaction that may accompany or, possibly, be afterwards based upon it. We are therefore of opinion that an assignee of a policy may count upon an assignment of the policy without anticipating and negating the defense that the assignment was a part of a transaction that contravenes public policy. This holding is in accord with the rule that illegality in a transaction is never presumed; but, on the contrary, that everything is presumed to have been legally done until it otherwise appear. 1 Chitty, Pleading (14th Am. ed.), *221. We are of opinion that each paragraph of cross-complaint stated a cause of action.

As it appears from the cross-complaint that the Metropolitan Life Insurance Company is a New York corporation, it is unnecessary to consider the effect of §4914h Burns 1901, that counsel for appellee urge upon our attention. We need not discuss whether the sustaining of the demurrer to the special answers was harmless, as claimed by appellee, on the ground that the defense might have been made under the general denial. Even admitting that this is correct, it yet remains that appellant was entitled to have the issues in shape so that she could have recovered affirmatively under her paragraphs of cross-complaint. The sus-

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taining of the demurrers to such paragraphs was therefore prejudicial error.

Judgment reversed, with directions to the trial court to overrule the demurrers addressed to the respective paragraphs of cross-complaint, and to grant the parties leave to reframe the issues on the complaint of appellee, without prejudice because of former rulings on the pleadings based thereon.

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[No. 19,859. Filed October 17, 1902. Rehearing denied January 9, 1903.]

LANDLORD AND TENANT.—*Natural Gas Explosion.—Liability of Landlord.—Negligence.*—Where a landlord occupied a portion of a building, and piped it for natural gas for its own benefit solely, and not for the use of the tenant, it was bound to use ordinary care to prevent the escape of gas therefrom; and where such pipes were defective and leaking, and known by the landlord to be in such defective condition, the landlord is liable for injury to a tenant, who was without fault, for an explosion resulting from such leakage. pp. 653, 654.

SAME.—*Natural Gas Explosion.—Damages.—Pleading.—Negligence.*—An allegation in a complaint in an action by a tenant against the landlord for damages resulting from an explosion of natural gas which escaped from pipes placed in the building for the use of the landlord, that plaintiff without negligence and not knowing that gas had escaped and filled the room, and not knowing the danger of so doing, entered the room in which the gas was confined, was a sufficient averment as to knowledge on the part of plaintiff. pp. 654, 655.

SAME.—*Natural Gas Explosion.—Assumption of Risk.—Pleading.*—In an action by a tenant against a landlord for damages from an explosion of natural gas which had escaped from pipes placed in the building by the landlord for his own use and convenience, and not for the benefit of the tenant, the doctrine of assumed risk does not apply, and it is sufficient to allege that the injury occurred without contributory fault on the part of plaintiff. p. 655.

TRIAL.—*Interrogatories.*—The answer of the jury to interrogatories that there was "no evidence" of the facts so expected to be proved, was equivalent to a finding against the party propounding the interrogatories. pp. 655, 656.

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TRIAL.—*Interrogatories.*—*Verdict.*—*Conflict.*—An answer to an interrogatory will not overcome the general verdict on account of conflict therewith, where it is also in conflict with another interrogatory. pp. 657, 658.

LANDLORD AND TENANT.—*Natural Gas Explosion.*—*Notice.*—Where a cold storage company rented a room in which it had gas-pipes placed for its own use in another part of the building, and had notice that gas was escaping therefrom, its duty to repair the leaks or turn off the gas did not depend upon its superior knowledge or means of knowledge as to the condition of things in the tenant's room. pp. 658, 659.

From Marion Superior Court; *J. L. McMaster*, Judge.

Action by Harry H. Temperly against the Indianapolis Abattoir Company for damages from an explosion of natural gas. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1387u Burns 1901. *Affirmed.*

W. H. H. Miller, J. B. Elam, J. W. Fesler and S. D. Miller, for appellant.

W. N. Harding, A. R. Hovey and C. S. Wiltsie, for appellee.

DOWLING, C. J.—The appellant, which was the defendant below, was the owner of certain grounds and structures in the suburbs of the city of Indianapolis, one of which buildings was used for the purposes of cold storage. It was divided into rooms or compartments, which were rented to divers persons for the storage and preservation of meats and other articles by the use of cold air. The several buildings on the grounds were detached from each other, and separated by considerable spaces; one of them, quite remote from that used for cold storage, being occupied by appellant as its office. The appellant caused gas-pipes to be run up the side of the cold storage building, and through the lofts of the compartments rented to the tenants of these rooms, to its office, for the exclusive use of such office. The appellee rented and occupied one of the rooms in the cold storage building for the storage of fresh meats. On February 13, 1895, the room so used by the appellee had, without

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his knowledge, become filled with natural gas which escaped from the said pipes at some point on the said premises. The appellee on entering the room on the morning of that day, and while it was yet dark, struck a match to light a candle. A violent explosion from the ignition of the gas instantaneously took place, and the appellee was severely injured thereby. He brought suit to recover damages for the injuries alleged to have been sustained, charging in his complaint that the accident was occasioned by the negligence of the appellant in so constructing and maintaining the gas-pipes that gas leaked from them and escaped into the room rented by him. He alleged that the appellant had notice of the defective condition of the said gas-pipes, but that he had not, and that the accident and injury occurred without fault on his part. The answer of the appellant was a denial. The case was tried by a jury, which returned a general verdict for the appellee, with answers to a great number of questions of fact. The court overruled the motions of the appellant for judgment in its favor on the answers to the questions of fact and for a new trial. Judgment was rendered on the verdict and the abattoir company appealed.

We are asked to reverse the judgment because of the supposed errors of the trial court in its rulings on the demurrer to the complaint, and on the motions for judgment and for a new trial.

The first objection taken to the complaint is that it does not appear that the appellant, as landlord, violated any duty which it owed to the appellee as its tenant. While it is true that in this State a landlord can not be compelled to make repairs in the absence of an agreement to do so, and is not responsible for injuries resulting from such failure to repair, yet it is equally well settled that where he occupies a portion of the premises himself he is not permitted to use such parts in such manner as to injure his tenant. In the present case it is alleged that the appellant piped the

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premises for its own benefit solely, and not for the convenience or use of the appellee. It is perfectly clear that in so doing and in maintaining the gas-pipes it was bound to use ordinary care to prevent the escape of gas from them, and consequent injury to the appellee. It is averred that the gas-pipes laid down and maintained by the appellant for its own use were defective and leaking, and that this fact was known to the appellant. The appellant must be presumed to have known the dangerous qualities of escaping natural gas, and if, with the knowledge that it was escaping, it permitted such leakage to continue until an explosion took place, the injured tenant being without fault, the landlord would be liable. *Peil v. Reinhart*, 127 N. Y. 381, 27 N. E. 1077, 12 L. R. A. 843; *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. 293.

The appellant owed to the appellee the duty to use ordinary or reasonable care to prevent the escape of gas from its pipes in such quantities as to become dangerous to life or property. *Kemmell v. Burfeind*, 2 Daly (N. Y.) 155; *Mississinewa, etc., Co. v. Patton*, 129 Ind. 472, 28 Am. St. 203 and note; *Consumers Gas, etc., Co. v. Perrego*, 144 Ind. 350, 32 L. R. A. 146; *Richmond Gas Co. v. Baker*, 146 Ind. 600, 36 L. R. A. 683; *Citron v. Bayley*, 36 Hun, App. Div., 130, 55 N. Y. Supp. 382; *Consolidated Gas Co. v. Crocker*, 82 Md. 113, 33 Atl. 423, 31 L. R. A. 785; *Hunt v. Lowell Gas Light Co.*, 3 Allen (Mass.) 418; *Kibele v. City of Philadelphia*, 105 Pa. St. 41; *Parry v. Smith*, L. R. 4, C. P. D. 325, 41 L. T. (N. S.) 93; *Koelsch v. Philadelphia Co.*, 152 Pa. St. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. 653.

If it was necessary to aver want of knowledge of the escape of the gas on the part of the tenant, we think the allegation on that subject was sufficient. The averment was "that appellee, on the day of his injury, without negligence, and not knowing that said gas had escaped and filled his room, and not knowing the danger of so doing, entered

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the room in which said gas was confined," etc. We are of the opinion that in cases of this character the doctrine of assumed risk does not apply, and that it is sufficient to allege that the injury occurred without contributory fault on the part of the appellee. Besides, nothing in the complaint shows that the appellee knew that the pipes were defective, or that any gas had escaped from them, and we can not presume, from anything we find in the complaint, that he had such knowledge. The complaint was sufficient, and the demurrer to it was properly overruled.

In the discussion of the motion for judgment for the appellant upon the answers to the interrogatories, we have been referred by counsel to no answer which necessarily overthrows the general verdict. If it appeared from an answer that at the time of the explosion the appellee was not the tenant of the appellant, or that the appellant maintained no gas-pipes upon its premises, or that no leak existed in its pipes, or that the appellee, when he struck the light, knew that the room contained gas to a dangerous extent, or that the appellee was not injured by the explosion, such an answer would have been irreconcilable with the general verdict upon any theory, and would have overthrown it. But this is not the character of the answers upon which we are asked to reverse the judgment of the trial court. The plugging of a disused tin spout or pipe through which another tenant thought that escaping gas from outside the cold storage building or some other unpleasant odor found its way into the room occupied by him, is relatively of no importance in this case. A plug in that pipe did not stop any leak in the gas-pipes, and it was not the exercise of ordinary care to attempt to shut off the escaping gas by that expedient.

We set out a few of the interrogatories relied upon by appellant, with the answers to the same: "(17) Did said Bryan [another tenant of the cold storage building, occupying the compartment next to that held by the appellee] ask

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for a workman to stop a pipe in his room through which said Bryan believed gas might be coming into his room? A. Asked Mr. Alerdice [the president of the appellant] to have leak stopped." "(20) Did the abattoir company send one George Wonders to do such work as said Bryan wanted done, in response to his request? A. Yes." "(29) After said plugging, did the officers of the abattoir company believe that there was no further danger from gas? A. No evidence. (30) Did said officers have good reason so to believe? A. No evidence." "(46) Did any officer of the abattoir company have any means of knowing that there was gas in the particular room where plaintiff kept his meat on the morning of the accident to plaintiff? A. No evidence." "(51) Did the officers of the abattoir company go about the outside of its building and examine by the sense of smell to find escaping gas? A. Yes. (52) Upon such examination, was any place discovered near the buildings where escaping gas could be smelled? A. No evidence."

These answers, so far from supporting the proposition that judgment should have been rendered for the appellant, strongly tend to sustain the general verdict. They show that a short time before the accident the appellant had notice that gas was escaping in the vicinity of the warehouse and that the president of the company was notified to have "the leak stopped." They show what steps were taken by the appellant to protect its tenants from the dangers of escaping gas. The jury may have thought, and doubtless did believe, that these measures, both of investigation and prevention, were crude and grossly inadequate in view of the possible dangers involved. Interrogatories numbered twenty-nine and thirty were intended to elicit answers favorable to the appellant. The response of the jury that there was "no evidence" of the facts so expected to be proved was in each instance equivalent to a finding against the appellant.

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If, in answer to the forty-sixth interrogatory, the jury had said that "no officer of the abattoir company had any means of knowing that there was gas *in the particular room* where plaintiff kept his meat on the morning of the accident," we do not perceive how that answer would have aided the appellant. Its liability did not depend on notice of the fact that on the morning of the accident gas had accumulated in that room, but upon its previous knowledge that an insidious and deadly fluid had escaped at some point, probably upon its premises; that it was flowing in greater or smaller quantities by day and by night; that it was liable to penetrate any room in the building, and accumulate there when the room was tightly closed, and to ignite and explode with terrific force upon contact with the flame of a match or candle.

"(38) Was there gas in plaintiff's room when he opened the door on the morning of the accident in such quantities as to explode when fire came in contact with it? A. Yes. But the door was opened by Thorne. (39) Could such gas have been readily smelled when the door was opened by any one giving attention to his surroundings? A. Yes." These answers prove no fact inconsistent with the general verdict. They establish the charge of the complaint that the room rented by the appellant to the appellee had become filled with gas, and that it was ready to explode upon contact with fire. They state that when the door of the room was opened by any one giving attention to his surroundings, gas could readily have been smelled. But they disclose, also, that the door was opened, not by the appellee, but by a man named Thorne. Just what was meant by "giving attention to his surroundings" is not evident. It would seem to indicate something more than the ordinary care which a tenant is required to take in entering a room rented to him. The tenant was not obliged to make tests for the presence of gas or anything else. He had the right to presume that his

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room was free from noxious substances, and to enter it freely. His attention might have been fixed upon his business; his sense of smell, or ability to investigate odors, may have been obtuse. But, if any conclusion favorable to the appellant could have been drawn from these answers, their effect was completely neutralized by the answer to the forty-fourth interrogatory, which seems to be directly contradictory of the answer to number thirty-nine. The former was as follows: "(44) At the time the plaintiff lighted the match, could he have smelled gas if he had been giving attention to his surroundings? A. No." Even if the answer to the thirty-ninth interrogatory had been of controlling effect if standing alone, its inconsistency with the forty-fourth would have left the verdict unaffected. *Dickey v. Shirk*, 128 Ind. 278; *Heltonville Mfg. Co. v. Fields*, 138 Ind. 58; *Ohio, etc., R. Co. v. Heaton*, 137 Ind. 1.

All of the answers to the questions of fact submitted to the jury are easily reconciled with the general verdict without the aid of the evidence admissible under the issues which may be presumed to have been presented to the jury. *Louisville, etc., R. Co. v. Creek*, 130 Ind. 139, 14 L. R. A. 733; *Rogers v. Leyden*, 127 Ind. 50; *British-American, etc., Co. v. Wilson*, 132 Ind. 278.

The motion for a new trial presents but two questions: (1) That of the sufficiency of the evidence to sustain the verdict; and (2) that of the correctness of the instructions referred to in the motion. A very careful reading of the record satisfies us that there was not a total failure of proof upon any issue in the cause. The knowledge of the appellant of the escape of gas, the sufficiency of the means adopted to discover and stop it to relieve the appellant of the charge of negligence, the knowledge or ignorance of the appellee of the perils of the situation when he entered his room,—all of these were matters of fact upon which there was more or less evidence before the jury. This being the state of the record, the verdict must stand.

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Neither the third instruction nor the seventh was erroneous because of its omission of the statement that the appellee could not recover unless he proved that he did not voluntarily assume the risk arising from the escape of the gas. The question of assumption of risk was not involved.

The eighth instruction requested by the appellant, contained these words: "Unless the defendant had some superior knowledge, or means of knowledge, not possessed by the plaintiff as to the condition of things in his room, it was under no duty to make any changes with respect to gas about its premises." The duty of the appellant did not depend upon its superior knowledge, or means of knowledge, as to the condition of things in appellee's room. If it had notice that gas was escaping from its pipes on its premises in the vicinity of the building used for cold storage, in which appellee had a rented room, and could foresee that it was likely to enter that building and appellee's room, its duty to its tenant required that it should find the leak and stop it, or cause the gas to be shut off until the leak could be found, or to take such other precautions to prevent injury to its tenant as a person of ordinary prudence, dealing with so dangerous an agent as natural gas, would adopt.

The modifications of instructions numbered twelve and thirteen by the court were reasonable and proper. Without such corrections, these instructions misstated the law, and did not fairly present the issues to which the law so stated was intended to apply. We find no error in the action of the court in refusing to give these instructions as presented, or in modifying them as it did.

There is no error in the record. Judgment affirmed.

ROBSON ET AL. v. RICHEY ET AL.

[No. 20,001. Filed January 13, 1903.]

COUNTY COMMISSIONERS.—*Vacating Order Establishing Highway.*—The statute which grants all the power possessed by the board of county commissioners does not confer upon such board authority to annul or modify a judgment or grant a new trial; and where the board of commissioners has made an order establishing a highway, and such order has been recorded, it has no power to vacate it, either at the same or subsequent term. *pp. 660-662.*

SAME.—*Appeal.*—An appeal from the decision of the board of commissioners must be taken within thirty days. *p. 663.*

From Knox Circuit Court; *O. H. Cobb*, Judge.

From a judgment dismissing an appeal from the order of the board of commissioners establishing a highway, Henry Robson and others appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

J. T. Goodman, B. M. Willoughby, J. M. House, W. H. De Wolf and *E. H. De Wolf*, for appellants.

W. A. Cullop and *G. W. Shaw*, for appellees.

HADLEY, C. J.—At the October term, 1899, of the board of commissioners of Knox county, appellees filed their petition for the establishment of a highway. Viewers were appointed who reported that the proposed highway would be of public utility. Upon appellants' remonstrance, claiming damages, reviewers were appointed who reported December 5, 1899, that appellants would be damaged in the sum of \$100. Whereupon appellants filed their petition for an order setting aside the reviewers' report, and for the appointment of other reviewers to assess their damages. Before action upon this latter petition, appellants, by their attorney, dismissed the same, and thereupon, on said December 5, 1899, the commissioners entered a final order establishing said highway, and ordering it opened upon the payment of said \$100 damages to appellants. December 22, 1899, appel-

Robson v. Richey.

lants filed in the auditor's office their appeal bond, reciting therein their appeal to the circuit court from a judgment of the commissioners dated December 5, 1899, and on July 16, 1900, filed their appeal in the Knox Circuit Court. December 17, 1900, on motion of appellees, the court dismissed the appeal, and directed that the cause be certified back to the commissioners. December 24, 1900, appellants filed before the commissioners their petition "to set aside and vacate the order of the board dismissing the remonstrance of Henry and Mary Robson, appellants, and ordering said highway established and opened;" and the same being submitted to the board on January 8, 1901, it then ordered that said order of dismissal, and for the establishing and opening of said highway made December 5, 1899, "be set aside and vacated, and it is now further ordered that the highway as petitioned for, and described on page," etc., "is hereby established and ordered opened." January 24, 1901, appellants filed in the auditor's office their second appeal bond, reciting in the bond that they had appealed to the circuit court from a judgment rendered by the board on the 8th day of January, 1901. January 31, 1901, the second appeal was filed in the Knox Circuit Court, the transcript of which was identical with the first, to and including the final order for the location and opening of the highway, entered December 5, 1899, and on March 25, 1901, upon appellees' motion the court again dismissed the appeal. From this latter judgment this appeal is prosecuted, and the only error assigned is the action of the court in dismissing the appeal.

Attention is directed to the fact that after the dismissal of the first appeal by the circuit court on December 17, 1900, appellants reappeared before the commissioners, and on December 24, 1900, filed their petition for an order setting aside and vacating the final order that had been by them unsuccessfully appealed from, and for the entry of another, omitting and eliminating therefrom the order dis-

missing appellants' remonstrance. The claim of appellants being that the order dismissing their remonstrance was never in fact made, and was by the mistake and inadvertence of the auditor written into the final order without authority from the commissioners so to do.

We are unable to perceive any theory upon which this appeal may be sustained. The application for a reformation of the judgment was made more than a year after the judgment had been entered. In its defective form, it had been appealed from and treated by the parties and the circuit court as *prima facie* a valid judgment. So far as appears, its integrity was never assailed or questioned until the appeal therefrom had been dismissed from the circuit court. It is very clear that after the final order had been made and recorded the commissioners had no power to vacate it, either at the same or subsequent term, even though they afterwards became convinced that it was wrong. The statute which grants all the power they have, does not confer upon boards of commissioners authority to annul or modify a judgment it has rendered, or to grant a new trial; and, however erroneous such judgment or final order may be, the only remedy is by appeal. *Badger v. Merry*, 139 Ind. 631, and cases cited.

Appellants' insistence is that notwithstanding the limited power of the commissioners, the board at all times had power to make its judgment speak the truth. In this they claim that the final order was not recorded by the auditor as it was rendered by the court, and that the order of January 8, 1901, reforming the final order of December 5, 1899, only eliminated what the auditor put in without authority, and was therefore no part of the judgment of the court. Conceding, without deciding, that the board had the power to strike out of its former judgment unauthorized and extraneous matter, and thus establish a correct and true record of its judgment, even this view would not avail appellants, because their appeal is from what purports to be

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a final order entered January 8, 1901, and not from the final order as it was in fact rendered December 5, 1899. Upon either theory this appeal must fail, (1) because the action of the board taken on January 8, 1901, was void as a final order establishing the highway (see authorities above cited); and (2) it can not be sustained as an appeal from the alleged corrected final order of December 5, 1899, because not taken within thirty days from the rendition thereof. §§7859, 7860 Burns 1901.

Judgment affirmed.

BUSH ET AL. v. McBRIDE.

159 663
f166 143

[No. 20,015. Filed January 13, 1903.]

APPEAL AND ERROR.—*Joint Assignment of Errors.*—A joint assignment of error based upon the action of the court in overruling a demurrer to a complaint is not available where the complaint was good as to some of the appellants joining in the assignment of errors.

From Clinton Circuit Court; *J. V. Kent*, Judge.

Action by William T. McBride against William H. Bush and others on a promissory note. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

Joseph Claybaugh and *N. P. Claybaugh*, for appellants.
Joseph Combs, for appellee.

MONKS, J.—Appellee brought this action to recover judgment on a promissory note executed by appellant William H. Bush, and to foreclose a mortgage on real estate executed by Bush and wife to secure said promissory note. Appellant Nathan Miller who had possession of a part of the real estate described in said mortgage as receiver, and who was sued by permission of the court in which he was appointed, was made a defendant to said action. Bush and wife and said receiver each filed a demurrer for want of facts to the complaint, which was overruled. Said appellants refusing

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to plead over, judgment was rendered foreclosing said mortgage against all of them and against said Bush on said promissory note.

Appellants Bush and wife, and Miller, receiver, jointly assign for error "that the court erred in overruling the demurrer to the complaint."

It is insisted by said appellants that the complaint was not sufficient to entitle appellee to a foreclosure of said mortgage. It is clear, however, that the allegations of the complaint were sufficient to entitle appellee to recover judgment against William H. Bush on the note sued upon. As said joint assignment of errors is not good as to all the appellants joining therein, it is not available. Ewbank's Manual, §138, and cases cited; *Green v. Heaston*, 154 Ind. 127, 130, and cases cited; *Doty v. Patterson*, 155 Ind. 60, 61; *Sheeks v. State, ex rel.*, 156 Ind. 508, 509, and cases cited; *M. A. Sweeney Co. v. Fry*, 151 Ind. 178, 181.

Finding no available error in the record, the judgment is affirmed.

ISLAND COAL COMPANY v. SWAGGERTY.

[No. 19,648. Filed January 16, 1901. Rehearing denied January 18, 1903.]

NEGLIGENCE.—Assumption of Risk.—Violation of Statutory Duty.—Master and Servant.—The doctrine of assumption of risk does not apply to a case where the injury occurs by reason of the negligent non-observance by the master of a positive and fixed duty enjoined by statute. pp. 667.

MASTER AND SERVANT.—Fellow Servant.—Mines.—A mine owner is not relieved under the fellow servant rule from liability for an injury sustained by a mine employe because of the failure of the mine boss, who represented the owner in the mine, to stop the elevator in its descent by pulling the cord attached to the whistle valve. pp. 667-669.

NEGLIGENCE.—When Question of Fact.—Whether a mine boss who stood at the bottom of an elevator shaft at the edge of a pit or sump which plaintiff was engaged in cleaning out was guilty of negligence in failing to signal the engineer to stop the elevator

159	664
160	238

159	664
161	681
161	700

159	664
164	421
164	512
164	515
164	516

159	664
166	298
166	299

159	664
169	253
169	327
170	630

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in its descent was a question of fact for the determination of the jury. pp. 669-671.

From Daviess Circuit Court; *D. J. Hefron*, Judge.

Action by William F. Swaggerty against the Island Coal Company for personal injuries. From a judgment for plaintiff, defendant appeals. *Affirmed*.

C. E. Barrett, *C. G. Gardiner* and *W. R. Gardiner*, for appellant.

C. E. Davis and *W. V. Moffett*, for appellee.

BAKER, J.—This cause has been transferred here because the Appellate Court was equally divided on the questions involved. *Island Coal Co. v. Swaggerty*, 27 Ind. App. 697.

Appellee had judgment against appellant for damages for personal injuries, the proximate cause of which was alleged to be appellant's failure to comply with certain provisions of the statutes in relation to the operation of coal mines. The assignments challenge the sufficiency of the complaint and the correctness of the ruling denying a new trial. The controlling questions relate to assumption of risk and contributory negligence, and were decided adversely to appellant's contention in *Davis Coal Co. v. Polland*, 158 Ind. 607.

We find no error in the record. Judgment affirmed.

ON PETITION FOR REHEARING.

GILLET, J.—Complaint is made that in the opinion heretofore rendered in this cause it was held that all of the questions presented were ruled by the case of *Davis Coal Co. v. Polland*, 158 Ind. 607. Upon a reëxamination of the principal brief of appellant it appears that the predominant proposition urged was that appellee had assumed the risk, but, after a full consideration of the matter, we have concluded to review the particular points on which a rehearing is sought.

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The action is for a personal injury sustained by appellee from a descending elevator while employed in the coal mine of appellant, owing to the alleged negligence of the latter. The case was tried upon the second paragraph of the amended complaint, and the first question presented is as to the sufficiency of said paragraph. According to said paragraph, the appellee received his injury while engaged in cleaning out a sump or pit, extending to a depth of six feet below the lower surface of the mine, that was constructed for the purpose of so receiving the elevator operated in the shaft that the floor of said elevator might rest on a level with the surface of the mine when the elevator was at the bottom of the mine.

By the second paragraph of the amended complaint it is sought to charge appellant with negligence on two grounds: (1) In failing to maintain the statutory code of signals relative to the use of elevators in coal mines; and (2) because of the omission of the mine boss, who represented the appellant in all things in the management of the interior of said mine, in failing to stop the elevator in its descent by the pulling of the cord attached to the whistle valve, as it is alleged that he might have done, as he stood on the edge of the sump in which he had ordered appellee to work, and saw the elevator descending towards him. The question as to whether the last stated cause of negligence, instead of both, appears to have been the proximate cause of the injury is not urged, and therefore we do not consider it. As the case is presented in argument on the motion for a rehearing, we feel at liberty to treat the complaint as charging both grounds of negligence.

There is no merit in the claim that the complaint shows on its face that appellee was guilty of contributory negligence. The complaint alleges that he was injured without any negligence on his part, and the specific facts averred are not sufficient to overcome the force of such general averment.

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In respect to the first ground of negligence above stated, the complaint is not open to the objection of appellant's counsel that appellee assumed the risk. The complaint discloses that appellant had omitted to establish the code of signals required by statute, §7470 Burns 1901, and had negligently caused the movements of said elevator, in respect to the stopping and lowering of the same, to be governed by the same signal,—a single blast of the whistle,—and that by reason of a misapprehension by the engineer of the purpose of such signal in the particular instance he lowered the elevator into the sump, instead of stopping the same, thereby injuring appellee.

The claim that under the first charge of negligence appellee assumed the risk is shown to be erroneous by the late case of *Davis Coal Co. v. Polland*, 158 Ind. 607. The doctrine of assumption of risk does not apply to a case where the injury occurs by reason of the negligent nonobservance of a positive and fixed duty enjoined by a statute. The same proposition meets most of the objections to instructions given and refused. As to the second charge of negligence, the complaint states a cause of action.

It is further objected, however, that certain instructions given, that were founded on said omission of the mine boss, were improper. The complaint is not based on the employer's liability act. Appellant's counsel objects to the instructions mentioned on the ground that the mine boss was a fellow servant of appellee. If this be true, appellee must be held to have assumed the risk of the negligence of a fellow servant, in the absence of any claim that the master had knowledge that he was negligent. It is undoubtedly the law that mere difference in rank between the servant injured and the servant whose negligent omission occasions the injury does not make the latter a vice principal. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Krueger v. Louisville, etc., R. Co.*, 111 Ind. 51; *Pennsylvania Co. v. Whit-*

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comb, 111 Ind. 212; *Justice v. Pennsylvania Co.*, 130 Ind. 321; *New Pittsburgh, etc., Co. v. Peterson*, 136 Ind. 398, 43 Am. St. 327; *Bedford Belt R. Co. v. Brown*, 142 Ind. 659; *Robertson v. Chicago, etc., R. Co.*, 146 Ind. 486; *Hodges v. Standard Wheel Co.*, 152 Ind. 680.

The master's duty is to use ordinary care to provide his servant with a safe working place, with safe machinery and appliances. If the master authorizes an agent to perform such duties, the agent, whatever his rank, stands in the place of the master. *Indiana Car Co. v. Parker, supra*; *Louisville, etc., R. Co. v. Graham*, 124 Ind. 89; *Ohio, etc., R. Co. v. Percy*, 128 Ind. 197. The duty of the master is a continuing one. *Indiana Car Co. v. Parker, supra*. The principle of liability is not confined to negligent orders. *Russ v. Wabash, etc., R. Co.*, 112 Mo. 45, 52, 20 S. W. 472, 18 L. R. A. 823. The master's duty requires performance. Until the agent selected by the master acts up to the limit of the duty of his master to act, the master's duty is not done. *McElligott v. Randolph*, 61 Conn. 157, 22 Atl. 1004, 29 Am. St. 181. In *Shearman & Refield, Neg.* (5th ed.), §233, it is said: "The value of any general principle of law depends mainly upon the method of its application. And while the principle heretofore stated has met with very general acceptance, its value has been greatly reduced in Maine, Massachusetts, Rhode Island, New York, and Maryland, by the narrow spirit in which the personal duties of masters have been defined; while in nearly all other courts its value has been greatly increased, by putting in the forefront of those duties the duty of general superintendence, including direction, control, watchfulness, warning, instruction and inspection. The test to be applied in each case, under this principle, is to inquire: What would have been the duty of the master had he been personally present? To whom did he delegate that duty, he being absent? That delegate, whether he be high or low, should be deemed, with respect to that duty, a vice prin-

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cipal. Foremost among the powers of a master, as already pointed out, is the power of giving orders. Foremost among his duties is that of general superintendence. He is equally responsible, where he deposes to another the duty of giving orders which he ought to give himself, if present; and if he deposes his power and duty of superintendence, he is responsible for the failure of his deputy to properly superintend. * * * The master's responsibility for the acts of his vice principal is to be determined, not merely by the character of the act which the latter performs, but also by the character of that which he *fails to perform*. If, therefore, a vice principal, invested with the power and duty of superintendence, negligently permits any act to be done which it would be the duty of the master, if present, to prevent, the master is responsible to a servant injured thereby, simply because of the failure of his superintending vice principal to prevent it being done. And the master is none the less liable, if the negligent act is done by the vice principal himself. So the master is responsible for the failure of a superintending servant to give such due warnings of dangers as the master should have given, if present. These doctrines are fully sustained by the decisions of the U. S. Supreme Court, and by those of the highest courts in Vermont, Connecticut, Delaware, Virginia, West Virginia, North and South Carolina, Georgia, Alabama, Louisiana, Texas, Arkansas, Tennessee, Kentucky, Ohio, Indiana, Illinois, Missouri, Minnesota, Kansas, Nebraska, Colorado, Montana, Utah, Oregon, Washington and Wyoming."

The mine boss was the representative of the master in the mine, and we think it clear that if the master had been an individual, and had been in the situation of the mine boss, it would have been his duty, in the discharge of his obligation, to use ordinary care to keep the place into which appellee had been ordered safe, not to have omitted such reasonable effort as he could have made to prevent the injury from the descending elevator that the evidence tends

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to show that he knew threatened said appellee. In other words, we think that appellee was entitled to take the verdict of a jury upon the question as to whether the mine boss should have signaled the engineer to stop the elevator.

A case of this kind is to be broadly distinguished from a case like *Kerner v. Baltimore, etc., R. Co.*, 149 Ind. 21, where the foreman was engaged in assisting the servant when the injury happened. In such a case he would then be acting in his capacity as a fellow servant, while here the duty that the mine boss owed was the duty of his principal.

The case of *Gerrish v. New Haven Ice Co.*, 63 Conn. 9, 27 Atl. 235, is a case to a considerable extent like this. In that case the plaintiff therein had been ordered to adjust some machinery that had become out of order, at a time when the engine was stopped for that purpose. The plaintiff's position, while adjusting said machinery, would become one of great danger if the engine should be started. The company had a rule, known to all its employees, that it was the duty of the superintendent under such circumstances to stand in a certain place, where he could oversee the work, and have in reach a bell-cord by which he could signal the engineer when to stop and when to start the engine, and that when the engine was stopped for such purpose the engineer should be personally notified and should not start the engine until being personally notified to do so. At the time in question the superintendent neglected to notify the engineer that said plaintiff was so adjusting said machinery, and left the place to get a needed appliance. The bell rung, as the jury specially found by reason of a piece of floating ice that had caused the disarrangement of the machinery being thrown down by the plaintiff and striking the bell-cord, and, as a result, the engineer started the engine, and the plaintiff was seriously injured. The defendant was held liable, principally on the ground that it had violated its own rule; but the court also held that it was liable on general grounds, presumably because the superintendent

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had without any precaution left the plaintiff in a situation of peril. In disposing of this branch of the case, the court said: "The defendant is a corporation. Mr. Bishop is, and was, its superintendent and the general manager of the business. He must be presumed to have had all the powers which his position implies. On the day that the plaintiff was injured he was present and in general charge of the work there being done. He was there undertaking to perform duties which it was the business of the master to perform. If only the ordinary rules of law applicable to the relation of master and servant are contemplated, it is obvious that the superior court did not require anything of the defendant which the law does not require, and that there is no error in the judgment." The evidence supports the verdict. The second charge of negligence at least was sufficiently made out to authorize appellee to have the question presented to the jury.

We have now considered all of the grounds on which a rehearing is sought, and, after doing so, we are of opinion that our original judgment of affirmance was right.

The petition for a rehearing is overruled.

TIBBITS v. MUTUAL BENEFIT LIFE INSURANCE
COMPANY.

[No. 19,975. Filed January 14, 1903.]

INSURANCE.—*Payment of Premium.*—*Forfeiture.*—*Complaint.*—Where a life insurance policy provided that failure to pay the premium on a certain day should work a forfeiture of the policy, an allegation in the complaint, in an action on the policy, that the policy was not delivered, and did not take effect, until five days after its date is not sufficient to show a change in the contract as to time of payment of premiums and avoid a forfeiture of the policy for failure to pay the premium at the time stipulated therein.

From Marion Superior Court; *J. M. Leathers*, Judge.

Action by Addie L. Tibbits against the Mutual Benefit Life Insurance Company on an insurance policy. From

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a judgment for defendant, plaintiff appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

G. A. Deitch and R. J. Brennen, for appellant.

Elmer Marshall, Henry Seyfried and J. W. Holtzman, for appellee.

DOWLING, J.—Appellant sued appellee upon a policy of insurance issued by the latter upon the life of one John C. Tibbits, the husband of the appellant, payable to her, which contained this condition: "This policy witnesseth that the Mutual Benefit Life Insurance Company, in consideration of the * * * sum of \$22.52 to it in hand paid by John C. Tibbits, and of the quarter-annual premium of \$22.52 to be paid at or before twelve o'clock m. on the 25th day of April, July, October, and January, in every year, during the continuance of this policy, does insure the life of John C. Tibbits * * * in the amount of \$2,000 for the term of life, payable to Addie L. Tibbits, wife of John C. Tibbits, in case she survives the insured. * * * Provided, that in case the said premiums shall not be paid on or before the several days hereinbefore mentioned for the payment thereof * * * then, and in every such case, this policy shall cease and determine," etc.

It is alleged that the insured died August 10, 1898; and it is admitted that the quarter-annual premium required to be paid on or before twelve o'clock m. July 25, 1898, was not paid. In the third paragraph of the complaint the failure of the insured to pay the quarter-annual premium falling due July 25, 1898, is excused on the ground that the policy, though dated April 25, 1898, was not, in fact, delivered to the insured, and by its terms did not take effect, until April 30, 1898, at which date the first premium was paid, and, therefore, that the next quarter-annual premium did not become due until the 30th day of July; that on the 25th day of July, 1898, the agent of the appellee notified the insured that unless the said premium should be paid at or before twelve o'clock noon of said 25th day of

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July, 1898, the company would not after that time receive it, but would insist upon the forfeiture of the policy according to its terms. The reasons stated in the fourth paragraph of the complaint for the failure of the insured to pay the premium at or before noon, July 25, 1898, were substantially the same as those set forth in the third paragraph. In the fifth paragraph it is claimed that the insured had the right, according to the terms of the policy, to pay said premium at any time on said 25th day of July, 1898, and that the demand of the appellee that said premium be paid at or before twelve o'clock noon of that day was wrongful and oppressive, and not authorized by the policy. Demurrers were sustained to the third, fourth, and fifth paragraphs of the complaint, and these rulings are assigned for error.

The only question presented is whether the excuses pleaded by appellant for the failure to pay the premium claimed to be due July 25, 1898, or any of them, were sufficient in law to avoid the forfeiture of the policy. We have no hesitation in saying that they were not. The payment of the premium at the very time fixed by the policy was a condition precedent on which the liability of the appellee was expressly declared to depend. The condition was a valid and an important one. *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662; *Smith v. New England, etc., Ins. Co.*, 28 U. S. App. 48, 11 C. C. A. 411, 63 Fed. 769; *New York Life Ins., Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.

The policy as written and accepted by the insured was the contract of the parties; and, in the absence of fraud or mistake, both were bound by its terms. *Dover, etc., Co. v. American Fire Ins. Co.*, 1 Marvel (Del.) 32, 29 Atl. 1039, 65 Am. St. 264, 269; *Thomas v. Prudential Ins Co.*, 158 Ind. 461.

Without regard to the time of the delivery of the policy, or of its taking effect, they had the right to fix the date at

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which each premium should become due. They did agree that the first quarter-annual premium should be payable July 25, 1898, at or before twelve o'clock m. of that day. Any other day in the month, before or after July 25th, might have been named by them, or the premium for the whole year might have been made payable on a day named in the policy. Both parties would have been bound by such an agreement. If at the time of the application for the policy the insured had executed his promissory note for the first quarter-annual premium, payable July 25, 1898, at or before noon, certainly, in the absence of fraud or mistake, he would have been bound to pay it at that time. He accepted the policy as it was written, with the stipulation that the premiums should be paid at or before certain days and hours. No objection was made by the insured to the terms of the policy, and he kept it by him until he died. No claim was made by him that there was a mistake in the instrument, or that the premiums were not payable precisely as stated. *Wood v. Lindley*, 12 Ind. App. 258.

We can discover no inconsistency in the conditions of the policy as to the time when the premiums became due, nor as to the effect of a failure, without sufficient excuse, to pay them when due. The exact time at which the premiums were to be paid was clearly designated, and the subsequent clause of forfeiture, declaring that "in case the said premium shall not be paid on or before the several days hereinbefore mentioned for the payment thereof, * * * then, and in every such case, this policy shall cease and determine," did not have the effect of changing and extending the time within which payment of the premiums might be made, so as to authorize their payment after noon and at any time during the several days on which they were made payable. The clause of the policy fixing the time of payment is definite and particular. The clause providing for the forfeiture, in case of the non-payment of a premium, is general in its terms, and does

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not undertake to fix the time of payment, but expressly refers to the preceding clause. The construction contended for by the appellant would render nugatory the clause which definitely fixed the time for the payment of the premiums. Such a reading of the instrument would violate a well established rule of construction, and can not be adopted.

The specific allegations of the complaint, showing that the premium was not paid when due, and alleging no sufficient excuse for such breach of the contract, control the more general one of performance of the conditions of the contract by the insured, and make it clear that there was such a breach of the terms of the policy as would defeat a recovery thereon. The failure of the insured to pay the premium falling due July 25, 1898, at or before noon, rendered the policy void. *Forbes v. Union Central Life Ins. Co.*, 151 Ind. 89; *Willcuts v. Northwestern, etc., Ins. Co.*, 81 Ind. 300; *Phoenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 21 Am. St. 203, 9 L. R. A. 317; 16 Am. & Eng. Ency. Law (2d ed.), 857, note 7; *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662; *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789.

As none of the paragraphs of the complaint stated a sufficient excuse for the nonpayment of the premium at the time it became due, the court did not err in sustaining the demurrers. Judgment affirmed.

LYNCH v. MILWAUKEE HARVESTER COMPANY

ET AL.

[No. 20,012. Filed January 15, 1903.]

NEW TRIAL.—*Causes.*—*Appeal and Error.*—Specifications in a motion for a new trial in a civil action "that the finding and judgment of the court is contrary to the evidence" and "that the finding and judgment of the court is contrary to the law" present no question on appeal, since the statute recognizes no such reasons for a new trial.

From Sullivan Circuit Court; O. B. Harris, Judge.

159	675
1166	365
159	675
1171	18

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Action by the Milwaukee Harvester Company against Maud Lynch and another. From a judgment in favor of plaintiff, defendant Maud Lynch appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

G. W. Buff and *A. D. Leach*, for appellant.

Silver Chaney and *A. G. McNabb*, for appellees.

MONKS, J.—The Milwaukee Harvester Company sued appellant and her brother, William Lynch, to recover judgment on a promissory note executed to it by said William Lynch, and to set aside the conveyance of certain real estate made by said Lynch to appellant, as fraudulent. A trial of said cause by the court resulted in a finding and judgment for the amount due on said note, and a decree setting the conveyance of said real estate aside, and subjecting the same to the payment of said judgment.

The only error assigned, and not waived, calls in question the action of the court in overruling appellant's separate motion for a new trial. The only causes assigned for a new trial, and not waived by the failure of appellant to argue the same in her brief filed within sixty days after the submission of the cause, are: "(1) That the finding and judgment of the court is contrary to the evidence; (2) that the finding and judgment of the court is contrary to the law."

Appellee insists that the law recognizes no such reasons for a new trial. Clause 6, §568 Burns 1901, §559 R. S. 1881 and Horner 1901, upon which said causes specified in appellant's motion for a new trial depend, provides: "That the verdict or decision is not sustained by sufficient evidence, or is contrary to law."

The statute, in plain language, names the causes which may be assigned for a new trial. It may be that, upon verdicts or findings in strict accord with the law and evidence, judgments contrary to the law and evidence are rendered.

Indianapolis St. R. Co. v. Hockett.

But the remedy against such errors is a motion to modify the judgment, and not a motion for a new trial. Elliott, App. Proc., §§344, 345, 346; Woollen, Trial Proc., §4424, and cases cited; *Evans v. State*, 150 Ind. 651, 655, and cases cited; *Rodefer v. Fletcher*, 89 Ind. 563; *Rosenzweig v. Frazer*, 82 Ind. 342; *Allen v. Berndt*, 133 Ind. 355; *People's, etc., Assn. v. Spears*, 115 Ind. 297, 299.

It has been uniformly held that causes for a new trial in the language of those in appellant's motion were unauthorized and insufficient in civil cases. Ewbank's Manual, §46; Woollen, Trial Proc., §§4420, 4424, and cases cited; notes to clause 6, §568 Burns 1901; *Gates v. Baltimore, etc., R. Co.*, 154 Ind. 338, 342, 343; *Dodge v. Pope*, 93 Ind. 480, 484; *People's, etc., Assn. v. Spears, supra*; *Rodefer v. Fletcher, supra*; *Rosenzweig v. Frazer, supra*; *Hubbs v. State, ex rel.*, 20 Ind. App. 181, and cases cited; *Louisville, etc., R. Co. v. Renicker*, 8 Ind. App. 404, 407, 413. See, also, *Huffman v. State*, 21 Ind. App. 449, 451, 69 Am. St. 368.

Judgment affirmed.

INDIANAPOLIS STREET RAILWAY COMPANY v.
HOCKETT.

[No. 20,002. Filed January 27, 1908.]

TRIAL.—*Instructions.*—*Harmless Error.*—*Carriers.*—A judgment against a carrier for personal injuries will not be reversed because of an instruction that defendant was liable for the slightest "neglect resulting in an injury," where the jury was clearly informed in other instructions that there could be no recovery unless plaintiff had proved by a preponderance of the evidence that the injuries sued for were the direct and proximate result of defendant's negligence specified in the complaint. p. 679.

SAME.—*Instructions.*—*Harmless Error.*—An instruction relating to an alleged condition which the jury found, in answer to interrogatories, did not exist, was harmless, though erroneous. pp. 681, 682.

SAME.—*Instructions.*—*Harmless Error.*—No error was committed in refusing an instruction which was irrelevant to the facts as found by the jury. p. 683.

159	677
167	265
167	266

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NEGLIGENCE.—*Street Railroads.—Passenger Attempting to Alight While Car is in Motion.*—Whether a passenger is guilty of negligence in attempting to get off a moving street car, not running at a dangerous rate of speed, is a question for the jury, to be determined from the facts, under proper instructions by the court. pp. 683, 684.

APPEAL AND ERROR.—*Exceptions.—Court Questioning Witnesses.*—The action of the court in interrogating appellant's witnesses will not be reviewed on appeal, where no objections or exceptions were reserved. p. 684.

From Marion Circuit Court; *H. C. Allen*, Judge.

Action by Frank M. Hockett against the Indianapolis Street Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court, under §1337u Burns 1901. *Affirmed.*

W. H. Latta, F. Winter and *Clarence Winter*, for appellant.

E. F. Ritter and *W. S. Doan*, for appellee.

HADLEY, C. J.—Action by appellee to recover damages for loss of services of his wife, and expenses in curing her, occasioned by injuries received through the alleged negligence of appellant. The negligence charged is to the effect that while the plaintiff's wife was a passenger on one of appellant's cars, which had stopped, at her request, at a regular stopping place, to enable her to alight therefrom, the defendant negligently failed to give her time to alight; and while in the act of alighting with all reasonable dispatch, and when she had proceeded as far and no farther than the step of the car, the defendant negligently and suddenly, and without any warning to the plaintiff's wife, caused said car to be suddenly, unexpectedly, and violently started forward, and thereby negligently and with great force threw the plaintiff's wife from the step of said car to the ground, whereby her arm was broken, and other severe and permanent injuries inflicted upon her. Answer by general denial. Trial by jury. Verdict and judgment for appellee for \$1,000.

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The errors complained of, and not waived, arise from the refusal of the court below to grant appellant a new trial.

Complaint is made of the giving and of the refusing to give certain instructions to the jury. By its number three the court charged the jury, in substance, that the defendant being a common carrier of passengers for hire, in legal contemplation, it was chargeable with the exercise of the highest degree of care to secure the safety of its passengers consistent with the practical operation of its road, the mode of traveling, and the character of the conveyance in use, and the defendant would, therefore, be responsible for the slightest neglect resulting in an injury to a passenger on its car, if such passenger at the time, was in the exercise of such care as an ordinarily prudent and cautious person would exert under the circumstances of the particular case.

The objection made to the instruction is that it is too broad, and is erroneous, for failure of the court to limit the defendant's liability to such neglect or omission of duty as is shown to be the proximate cause of the injury sued for. Considered abstractly, there is hardly tenable grounds for this criticism, for the words are "neglect resulting in an injury;" but the language employed in subsequent numbers removes every doubt of the propriety of the charge. It is stated in the next following instruction given to the jury, in unmistakable terms, that there could be no recovery unless the plaintiff had proved by a preponderance of evidence, that the injuries sued for were the *direct* and *proximate* result of the defendant's negligence specified in the complaint. And language to the same effect is repeated in number five. So when the instructions are considered as a whole, as we are required to consider them, it is obvious that the jury could not have been misled by the language complained of.

The substance of the fourth charge given, is that the gist of the plaintiff's action is that his wife was injured by the defendant negligently starting forward the car in which she

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was a passenger while she was alighting from it, and before he could recover he must establish by a preponderance of the evidence, (1) that his wife was injured; and (2) that such injury was the direct and proximate result of the negligent and careless starting of such car while the plaintiff's wife was alighting therefrom. It was the duty of the jury to determine whether the defendant was guilty of negligence in the alleged starting of the car while the plaintiff's wife was in the act of getting off, and whether the injuries complained of were caused thereby; and in settling these things they might consider, with all the other circumstances of the case in evidence, whether the car was fully stopped, and if stopped whether of sufficient length of time for the plaintiff's wife to have safely alighted, her age, size, and physical strength, and whether the car was so crowded with passengers as to make it difficult for her to depart. It was the duty of the defendant to stop its car for such a length of time, and to provide such facilities as would enable the plaintiff's wife to alight safely, and it should be held to a strict compliance with such duty. If, however, it was found that the car did not start while the plaintiff's wife was in the act of getting off, and that she fell from some other cause than the starting of the car, the plaintiff could not recover.

The objection presented to this instruction is that it is confusing and contradictory. That while it opens upon the correct theory of the complaint, it concludes with authorizing the jury to consider matters that would be competent only on the theory that the cause of action was for not stopping a sufficient time for the plaintiff's wife to get off. We cannot sustain this objection. Whether the car was, or not, stopped, was a proper inquiry. The untimely starting of the car is the act complained of, and there could be no starting without a previous stopping. The charge would have been quite as clear, and more skilfully drawn, if reference to the length of stoppage, the age, etc., of the wife,

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and the number of passengers aboard, had been omitted; but the closing sentences of the instruction clearly and correctly guided the jury in their duty under the complaint and removed every chance for harmful effect from the superfluous matter.

In its sixth instruction the court told the jury, in effect, that if the plaintiff's wife was a passenger on the defendant's car, and the car had been stopped for her to get off, but started again before she had time to do so, and if, at the time the car started she was in a position of safety upon the car, and the car had attained a rate of speed to make it dangerous for her to attempt to alight, and she knew such fact, or by the exercise of reasonable care might have known it, it was her duty to remain on the car until it was again stopped; and if, notwithstanding the movement of the car, she attempted to alight therefrom, while she knew, or might have known, that the car was moving at a rate of speed to make it dangerous for her to attempt to alight, the plaintiff could not recover, even if the car had been stopped, and wrongfully started before his wife had time to get off. The mere fact that the car started before she had time successfully to alight, gave her no right to make the attempt while the car was going at a dangerous rate of speed. The law does not require the same foresight and prudence of one suddenly and unexpectedly placed in a dangerous position by the wrongful act of a common carrier as is ordinarily required; and if the plaintiff's wife knew the car had stopped to let off passengers at a street crossing where cars were accustomed to stop for the discharge of passengers, she had a right to assume that the car would stop long enough for all to alight who desired, and if she was proceeding in reasonable haste to get off, she had a right, without something took place to put her on her guard, to act upon the theory that the defendant would do its duty with respect to the length of the stop.

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It is urged that the first branch of this instruction contains a misstatement of the law in this,—that by the exercise of his senses, which is always required, a passenger must as matter of fact know when a car he is on is moving, and so knowing, if he attempts voluntarily to leave such moving car, whether going fast or slow, he assumes the risk whatever it may be. This branch of the charge was given in reference to some testimony produced by the appellant tending to show that the plaintiff's wife, after the car had started, left her seat in the body of the car, and, going to the rear, stepped off while the car was running at its usual rate of speed between stopping places. The necessity of reviewing this part of the instruction is carried out of the case by the finding of the jury in answer to interrogatories propounded to them by the court at the request of appellant, that the plaintiff's wife, in proceeding to alight, had reached the step of the car, within one step of the ground, and which was not a place of safety, when the car was started. The instruction, therefore, related to a state of facts that the jury found, under the evidence, did not exist, and it could not have influenced the verdict; hence the giving of the instruction was harmless, if erroneous,—which we by no means admit. No valid objection to the remaining part of the instruction is pointed out, and we do not perceive that there is any.

Numbers three and four of the instructions requested by appellant and refused are, in substance, the same, and are to the effect that if the car started while the plaintiff's wife was upon it, and before she had time to alight, and while she was still in a position of safety, it was her duty to remain on the car until it could be stopped. If, instead of remaining on the car, she attempted to alight from it, plaintiff cannot recover, even though the car was wrongfully started before his wife could get off.

The fifth proposition refused amounted to this: If the car was running when the plaintiff's wife tried to get off,

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she was chargeable with the knowledge of that fact, though she may not actually have known it. These numbers were properly refused for two reasons: (1) Because the substance of each was given in the court's number six; and (2) because they were irrelevant to the facts in the case as the jury found them to be.

The sixth proposition refused was as follows: "The mere fact that the car started before the plaintiff's wife had time to alight, would not give her the right to jump from the car while it was in motion." In lieu of the above, the court gave the jury the following: "The mere fact that the car started before the plaintiff's wife had time to alight, would not give her the right to alight from the car while the same was going at a rate of speed which would make it dangerous to do so." While it is very true that the wrongful and premature starting of the car would not of itself justify the plaintiff's wife in leaving it while in motion, yet, so far as the instruction might convey the idea that the plaintiff's wife had no right, under any circumstances, to attempt to get off the car while it was in motion, it was too narrow. Usually there is a time, before a street car comes to a full stop, and after starting, when a passenger, ordinarily active, may safely alight from the step to the street. There are also other times when a car is going at such a rate of speed as to make it dangerous, and when an attempt to alight would be negligence. So whether the alighting, or the attempt to alight, from a moving street car not running at a dangerous rate of speed constitutes negligence, or due care, is a question for the jury, to be determined upon its own facts under proper instructions by the court. And if it is shown that the plaintiff acted as those of ordinary prudence and caution usually act in getting off of moving street cars, the act should not be counted as negligence. *Conner v. Citizens St. R. Co.*, 105 Ind. 62, 55 Am. Rep. 177; *Citizens St. R. Co. v. Spahr*, 7 Ind. App. 23; *Corlin v. West End St. R.*

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Co., 154 Mass. 197, 27 N. E. 1,000; *Cicero, etc., St. R. Co. v. Meixner*, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331.

By its number seven appellant requested the court to instruct the jury that if the car was in motion when the plaintiff's wife reached the platform, and before she went upon the step of the car, then they should find for the defendant. The refusal to give this instruction was also harmless, because, as we have heretofore seen, it was irrelevant to the facts as the jury found them to exist.

During the cross-examination of certain of appellant's witnesses the court interposed and propounded divers questions of its own motion. He did not interrogate any of the plaintiff's witnesses. Appellant complains that the conduct of the court in confining his questions to its witnesses, and the direct and energetic manner of the questions propounded, were prejudicial to its witnesses and cause of defense. No objection appears to have been made at the time to any of the questions asked, or to the manner in which they were stated, and no exception was reserved for this court. Appellant has, therefore, now no right to ask this court to give judgment on a matter with which it was content until the verdict had gone against it.

We are unable to say that the verdict was not sustained by sufficient evidence. A disparity in the number of witnesses signifies little as to the party entitled to the judgment. There is a sharp conflict in the evidence on the vital question in the case, and we have no power to weigh it.

Judgment affirmed.

Cruthers v. Bray.

CRUTHERS v. BRAY.

[No. 19,923. Filed November 25, 1902. Rehearing denied
January 27, 1903.]

HABEAS CORPUS.—*Criminal Law.*—*Habeas corpus* will not lie for the release of a prisoner remanded to the custody of the sheriff by a justice of the peace, upon waiver of a preliminary hearing, under an affidavit containing a colorable criminal charge, on the ground that no public offense was charged; since the remedy was by appeal.

From Hamilton Circuit Court; *J. F. Neal*, Judge.

Habeas corpus by Tyler Cruthers against Evan Bray. From a judgment for defendant, plaintiff appeals. *Affirmed.*

S. D. Stuart, C. G. Reagan, F. C. Reagan, George Shirts, L. S. Baldwin and W. S. Christian, for appellant.

GILLET, J.—Appellant sought by a *habeas corpus* proceeding to procure his release from the custody of appellee as sheriff of Hamilton county. Issues were duly made, and, after a hearing, appellant was remanded to the custody of appellee, as such sheriff. It appears without dispute that an affidavit containing at least a colorable criminal charge against appellant was filed before a justice of the peace of said county, and that after a preliminary hearing had been waived by said appellant, he was recognized to appear at the next term of the Hamilton Circuit Court, and in default of bail was committed to the jail of said county.

It is contended by appellant's counsel that the affidavit did not charge a public offense, that therefore the whole proceeding was void, and that appellant should therefore have been discharged. It is not necessary to set out the affidavit. It attempts to charge appellant with doing certain acts in this State in the commission of a felony that it is alleged was consummated in the state of Illinois, and the question which appellant's counsel principally discuss is whether the

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affidavit, in view of the provisions of §§1645, 2178 Burns 1901, charges a public offense.

The question obtrudes itself, however, as to whether the justice's judgment is open to collateral attack. In *McLaughlin v. Etchison*, 127 Ind. 474, 22 Am. St. 658, this court held that the fact that an affidavit that was filed before a justice did not charge a criminal offense did not render a judgment of conviction based thereon void. In the late case of *Koepke v. Hill*, 157 Ind. 172, we held that a judgment of conviction rendered by a police court was not open to assault on the alleged ground that the ordinance on which the prosecution was based was unconstitutional, for the reason that the court that heard the charge had jurisdiction to commit the error, if such it was. In passing upon the question the following language was used on page 177: "The court was in duty bound to act. It had to decide whether the facts stated made a case within the ordinance, and whether the ordinance was within the delegated legislative power of the city, and, if so, whether the ordinance and statute authorizing it conflicted with any provision of the Constitution. These were all questions of law, and if the court had jurisdiction to decide them correctly, it likewise had jurisdiction to decide them erroneously."

In passing upon a kindred question, in *Platt v. Harrison*, 6 Iowa 79, 81, 71 Am. Dec. 389, 390, the supreme court of Iowa said: "The argument is, that the ordinance was passed without authority of law, and was null and void. Whether it was or not, was a legitimate subject of inquiry by the magistrate, in the same manner as any other question which might be presented for his adjudication. And being determined by him, adverse to the position of the prisoner, his remedy was by appeal, or writ of error, and not by *habeas corpus*. It is not a case where a court has acted without having jurisdiction. On the contrary, the most that can be claimed is, that the magistrate *erred* in deciding that the ordinance was in force, and that the city had

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the power and authority to provide for the punishment of the offense. Such cases, we do not think, can be reviewed in this manner. The petitioner has a perfect, well defined, and complete remedy, in the regular and usual method of appeal. After conviction by a court having jurisdiction, though the conviction may be irregular or erroneous, the party is not entitled to this writ. The judgment and proceedings of another competent court, cannot be revised upon *habeas corpus*."

By §1133 Burns 1901, it is provided: "No court or judge shall inquire into the legality of any judgment or process whereby the party is in his custody, or discharge him when the term of commitment has not expired, in either of the cases following: * * * Second. Upon any process issued on any final judgment of a court of competent jurisdiction." The process under which appellant was held was a final judgment, in so far as the court rendering it was concerned. This point was decided by this court in the carefully considered case of *Turner v. Conkey*, 132 Ind. 248, 250, 17 L. R. A. 509, 32 Am. St. 251, where Elliott, J., speaking for the court, said: "If the judgment indirectly assailed by the petition had been a final one, there could be no doubt that if there was jurisdiction to enter it the assault would fail, since, as the cases all agree, where the inferior tribunal has jurisdiction, its judgments cannot be collaterally assailed. We can conceive no reason why a different rule should apply to a case where the authority of the inferior tribunal is to hold an accused to bail and in default of bail commit him to the custody of the proper officer of the law. It can make no difference so far as the mere question of holding in custody is concerned whether the judgment is a final one, entered upon a regular trial or is a judgment rendered upon a preliminary examination, for if there is power to give the judgment directing the restraint the judgment cannot be void."

 Baltimore, etc., R. Co. v. Adams.

In the case in hand there was at least color of law in the charge preferred. The justice was therefore confronted with the question as to his authority to proceed in the premises, and the implied determination that was involved in his act of proceeding was an act of jurisdiction. When, therefore, the justice having jurisdiction proceeded to, and did, render a final judgment in the cause, then, according to the express terms of the statute, the proceeding became impervious to the collateral attack of a *habeas corpus* proceeding.

Judgment affirmed.

BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY v. ADAMS.

[No. 19,765. Filed January 28, 1903.]

ATTACHMENT AND GARNISHMENT.—Judgment.—Payment.—Bar of Action by Original Creditor.—Where a garnishee, in compliance with a judgment of a foreign court of competent jurisdiction, has been compelled to pay a debt to another, after notice of the suit to the principal debtor and a full disclosure of the material facts known to the garnishee, such judgment may be pleaded in bar of an action on the claim by the original creditor. *pp. 688-694.*

SAME.—Judgments.—The fact that the original creditor obtained a judgment on his claim in this State before a judgment thereon in attachment was rendered in another state was in no wise inconsistent with the latter judgment. *pp. 694, 695.*

From Jackson Circuit Court; *T. B. Buskirk*, Judge.

Action by Charles Adams against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. *Reversed.*

Edward Barton, O. H. Montgomery, H. D. McMullen, C. W. McMullen and H. R. McMullen, for appellant.

J. H. Shea and C. E. Wood, for appellee.

GILLETT, J.—Appellee commenced this suit before the judge of the city court of Seymour to recover for services

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performed by him. There was an appeal to the court below. In the latter court appellant asserted a partial defense, based on the fact that it had been garnisheed before a justice of the peace in the state of Kentucky on account of the indebtedness here sued for, and that it had been compelled to pay the judgment of garnishment rendered in said cause. The record of the justice of the peace was exhibited, and a full showing made as to the statute and unwritten law of Kentucky relative to his jurisdiction. There was a finding and judgment for appellee in the circuit court for the full amount of his claim. Appellant unsuccessfully moved for a new trial. By a proper assignment of error, based on the overruling of said motion, appellant questions the correctness of the finding below, and here contends that "the decision of the court is contrary to law, in this, that it does not give full faith and credit to the records and judicial proceedings of the state of Kentucky."

It is not necessary to set out the proceedings of said Kentucky court in detail, further than to state that appellee had personal notice of said suit. No question is raised as to the jurisdiction of the Kentucky court over the *res*, or as to its jurisdiction over the parties litigant in this action. See, upon the subject of jurisdiction, *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144. If the judgment is valid, there has been a sequestration of the original debt; and if it can be said that the appellant has been compelled to pay the same to a third person, it should now be credited with the payment.

It was declared by Professor Kent that "It has become a settled principle in the English courts, that where a debt has been recovered of a debtor, under the process of foreign attachment, fairly and not collusively, the recovery is a protection to the garnishee against his original creditor, and he may plead it in bar." 2 Kent's Comm., 119. As said by Shaw, C. J., speaking for the supreme court of

Massachusetts, in the case of *Meriam v. Rundlett*, 13 Pick. 511, 515: "He who pays under the judgment of a tribunal having legal jurisdiction to decide, and adequate power over the person or property, to compel obedience to its decisions, has an indisputable claim to protection." As stated by the supreme court of Connecticut: "It was his [the garnishee's] duty to pay it. He had no choice on the subject, and, when paid, he is entitled to the benefit of its being a coercive payment." *Palmer v. Woodward*, 28 Conn. 248, 251. In fact, as against a garnishee who has been compelled to pay a debt to another, after full disclosure of the material facts known to him, in compliance with a judgment of a court of competent jurisdiction, we do not think that an authority will be found that denies the garnishee protection. We cite in support of this rule, *Chicago, etc., R. Co. v. Sturm*, *supra*; *Harmon v. Birchard*, 8 Blackf. 418; *Embree v. Hanna*, 5 Johns. 101; *Holmes v. Remsen*, 4 Johns. Ch. 460, 8 Am. Dec. 581; *Hull v. Blake*, 13 Mass. 153; *Wilkinson v. Hall*, 6 Gray 568; *Barrow v. West*, 23 Pick. 270; *Cottle v. American Screw Co.*, 13 R. I. 627; *Taylor v. Phelps*, 1 H. & G. (Md.) 492; *Seward v. Heflin*, 20 Vt. 144; *Coates v. Roberts*, 4 Rawle (Pa.) 100; *Wigwall v. Union Coal, etc., Co.*, 37 Iowa 129; *Smith v. Dickson*, 58 Iowa 444, 10 N. W. 850; Black, Judg. (2d ed.), §598; *Cushing, Trustee Process*, 118; *McConnell, Trustee Process*, §297.

It has been pointed out by Mr. Wade that attachment laws are purely statutory, and so loosely fitted into the general body of the law that it is difficult to formulate rules as to the duty of the garnishee. Wade, Attachment, §398. The governing principle of the garnishee's exemption from a second liability is the injustice of compelling him to pay, at the suit of his creditor, that which a court, having authority so to do, has *compelled* him to pay to another. It is obvious, therefore, that he must act fairly and without collusion. See cases last cited. Where the principal debtor

is not actually in court, and there is reason to suppose that he is not advised of the suit, the garnishee ought at least to answer all facts within his knowledge, that if the court were advised of would presumably lead it to refuse to subject the fund to sequestration. As said in *McConnell, Trustee Process*, §300, in speaking of the duties of the garnishee, to avoid a charge of laches: "If he could have prevented a judgment from being rendered by appearing, or if, having appeared, he denies a fact he ought to have disclosed, or does not disclose facts he ought to have disclosed, payment by him will be of no avail." But the whole burden of contesting the suit is not cast upon the garnishee. Thus, he is not obliged gratuitously to defend the main action (*Harmon v. Birchard, supra; Cottle v. American Screw Co., supra*), or to appeal, where a true disclosure has been made. *Cottle v. American Screw Co., supra; Webster v. City of Lowell*, 2 Allen 123; *Hull v. Blake, supra*. It was said in the latter case: "It is true, there are higher tribunals in the state, to which the present defendant might have resorted; but we do not think that he was obliged to do so. It was enough for him to present to the court a true state of his relation to Billings, his creditor: and he might safely acquiesce in the decision of that tribunal, to which the laws of the state had given authority over the subject."

We need not here undertake to state the measure of the garnishee's duty in all cases, but it may be said, so far as the main action is concerned, that where the principal defendant has personal knowledge of the suit the former is not bound in any event to go further than to look to the jurisdiction, act fairly, and make a full disclosure. In *Wigwall v. Union Coal, etc., Co.*, 37 Iowa 129, a case much like this, it was said: "The defendant in this case has once paid the amount due plaintiff to a creditor of his, whereby plaintiff has had the full benefit of it. The defendant ought not to be required to pay the amount a second time unless guilty of some negligence or wrong toward plaintiff. The finding

of facts show that the defendant answered truly and fully every known fact, and also stated that the plaintiff herein, its creditor, claimed to be the head of a family, whereby the debt sought to be garnisheed would be exempt. The plaintiff herein was a party to the case, and was fully notified of the garnishment proceedings. It was his duty to furnish defendant the information and means to prove the fact, or himself to prove it. *Walters v. Washington Ins. Co.*, 1 Iowa 404; *Drake on Attachment*, §§717 and 718, and cases cited; *Wood v. Partridge*, 11 Mass. 488. The plaintiff having notice of the garnishment proceedings, and being in effect a party thereto, is bound or concluded by the judgment therein as well as the defendant. It was his privilege and duty, if that judgment was erroneous, to have it set aside or appeal from it. He cannot allow it to stand, and at the same time impeach it collaterally. The garnishee having answered truly and fully and in good faith is entitled to protection." See, also, *Webster v. City of Lowell*, 2 Allen 123; *Morrison v. New Bedford Inst., etc.*, 7 Gray 269; *Boydton v. Fly*, 12 Me. 17; *Goddard v. Collins*, 25 Vt. 712.

In *Chicago, etc., R. Co. v. Meyer*, 117 Ind. 563, 567, where the garnishee procured and filed the affidavit of the principal defendant, stating that the debt was exempt, but where no further steps were taken by way of defense, it was said by this court: "There were no facts found by the trial court which could justify an inference even that at the time of the institution of such proceeding in garnishment, and at all times since, Blazius Meyer was not and had not been a man of sound mind and mature years, and fully capable of interposing or causing to be interposed, at the proper time and place, every defense he had, or thought he had, legal or equitable, to such proceedings. Nor were any facts found by the court which would authorize the conclusion, whether of law or fact, that it was the duty of the defendant or of its attorneys, as such, to make any defense whatever for or on behalf of plaintiff Meyer to the proceeding

in garnishment." As far back as the case of *Harmon v. Birchard*, 8 Blackf. 418, 419, this court said: "A garnishee in attachment is not bound to superintend a defense for the principal debtor, and is not answerable for such defects and irregularities in the proceedings as relate only to the mutual rights of the original parties to the attachment suit, but he should know that the proceedings against himself are valid and such as he is legally compelled to obey."

The case of *Terre Haute, etc., R. Co. v. Baker*, 122 Ind. 433, rests on the ground that there was a lack of jurisdiction over the *res*, because the claim was exempt from garnishment under the laws of Missouri, where the proceeding was instituted. The failure to make disclosure of such a known defense might, even apart from the matter of jurisdiction, where the principal defendant had no notice, subject the garnishee to such an imputation of fraud or laches that he might be compelled to pay the debt again, but it cannot be held that the existence of the exemption laws of this State could be pleaded. It has often been held that exemption laws relate to the remedy, and have no extraterritorial effect. *Bolton v. Pennsylvania Co.*, 88 Pa. St. 261; *Leiber v. Union Pac. R. Co.*, 49 Iowa 688; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; *Wade, Attachment*, §§373, 395. This point has been expressly ruled, in a case much like this, by the Supreme Court of the United States. *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144.

In this case appellant caused appellee to be personally notified of the pendency of the suit in Kentucky,—aside from the judicial notice that he received,—and disclosed to the court the nature of the demand, and sought to claim the exemption of appellee under the laws of Indiana.

The burden was on appellee, the judgment being shown to be valid on its face, to show facts that would render it equitable and just to require appellant to pay again. As

declared by Chancellor Kent in *Holmes v. Remsen*, 4 Johns. Ch. 460, 467, 8 Am. Dec. 581: "If money be duly attached in the hands of a party, and he has paid it, pursuant to the judgment of a competent foreign court, I am to presume *omnia rite acta*; and it may be laid down as a clear principle of justice, that a person compelled, by a competent jurisdiction, to pay a debt once, shall not be compelled to pay it over again." See, also, *Taylor v. Phelps*, 1 H. & G. (Md.) 492. We are not judicially advised as to whether the claim in question was exempt from garnishment in Kentucky. The presumption, in the absence of any showing as to exemption, would be that the common law prevailed there. *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Jackson v. Pittsburgh, etc., R. Co.*, 140 Ind. 241, 49 Am. St. 192.

The evidence in this case tends to show that the original creditor violated our statutes in sending the claim without the State for the purpose of garnishment (§§2283, 2284 Burns 1901); but it does not appear that appellant failed to disclose any defense within its knowledge. A wrong has been done the appellee, but its consequences ought not to be visited upon the appellant in the absence of any showing that it was a party to or responsible for such wrong.

Counsel for appellee wholly misapprehend the effect of the fact that appellee obtained a judgment on his claim in this State before judgment was rendered in the Kentucky court. It is to be remembered that the action in Kentucky was commenced, and service was there had upon appellant, before the institution of this suit. To quote from the language of the court in *Embree v. Hanna*, 5 Johns. 101, 103: "The attachment of the debt in the hands of the defendant, fixed it there, in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a *lien* upon the debt, binding upon the defendant; and which the courts of all governments, if they recognize such proceedings at all,

Smith v. State, *ex rel.*

cannot fail to regard. *Qui prior est tempore potior est jure.*" The fact that a judgment was obtained in this State was in no wise inconsistent with, but was based on the fact that the appellant owed the appellee, and that was the basis of the garnishment in Kentucky. The effect of the pendency of said suit merely conferred a privilege upon the appellant to seek a stay of proceedings in this action. *Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 504; Drake, Attachment (6th ed.), §700. See, also, *Nevian v. Poschinger*, 23 Ind. App. 695.

We think it clear that the court below did not give the judgment of the Kentucky court, duly certified as it was, the full faith and credit that it was entitled to under the federal Constitution. *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144.

A motion has been made to dismiss the appeal in this case, but, in view of the question involved, the motion is overruled.

Judgment reversed, with an instruction to the circuit court to grant appellant's motion for a new trial.

SMITH, AUDITOR OF MARION COUNTY, v. STATE,
EX REL. LEWIS ET AL.

[No. 19,901. Filed June 27, 1902.]

From Marion Circuit Court; *H. C. Allen*, Judge.

Mandamus by State on relation of Martha Lewis and others against Harry B. Smith, auditor. From a judgment for relators, respondent appeals. *Affirmed.*

R. O. Hawkins and *H. E. Smith*, for appellant.

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley* and *W. B. Schwartz*, for appellees.

GILLET, J.—This is the second appeal of this cause. Upon the first appeal (*State, ex rel., v. Smith*, 158 Ind. 549), the essential questions on this appeal were determined against the appellant herein. On the authority of the decision rendered in said former appeal, the judgment of the court below, from which this appeal is prosecuted, is affirmed.

Dowling, C. J., and Monks, J., dissent.

State v. Wright.

THE STATE v. WRIGHT.

[No. 19,712. Filed November 20, 1902.]

From Marion Criminal Court; *Fremont Alford*, Judge.

Frank M. Wright was prosecuted for filling certain trade-marked bottles. From a judgment quashing the indictment, the State appeals. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley*, *J. C. Ruckelshaus*, *J. B. Kealing*, *M. M. Hugg*, *W. W. Woollen* and *Evans Woollen*, for State.

MONKS, J.—The questions presented in this case are the same as those presented and decided in *State v. Wright*, ante, 422, and upon the authority of that case the appeal is dismissed.

THE STATE v. SAGALOWSKY.

[No. 19,715. Filed November 25, 1902.]

From Marion Criminal Court; *Fremont Alford*, Judge.

Isaac Sagalowsky was prosecuted for filling certain trade-marked bottles. From a judgment quashing the indictment, the State appeals. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley*, *J. C. Ruckelshaus*, *J. B. Kealing*, *M. M. Hugg*, *W. W. Woollen* and *Evans Woollen*, for State.

MONKS, J.—The questions presented by the record in this case are the same as those presented and decided in *State v. Barnett*, ante, 432, and on the authority of that case the appeal is dismissed.

THE STATE v. WRIGHT.

[No. 19,713. Filed December 10, 1902.]

From Marion Criminal Court; *Fremont Alford*, Judge.

Frank M. Wright was prosecuted for filling certain trade-marked bottles. From a judgment quashing the indictment, the State appeals. *Appeal dismissed.*

W. L. Taylor, Attorney-General, *Merrill Moores*, *C. C. Hadley*, *J. C. Ruckelshaus*, *J. B. Kealing*, *M. M. Hugg*, *W. W. Woollen* and *Evans Woollen*, for State.

MONKS, J.—The questions presented in this case are the same as those presented and decided in *State v. Wright*, ante, 422, and upon the authority of that case the appeal is dismissed.

RACER ET AL. v. INTERNATIONAL BUILDING AND
LOAN ASSOCIATION.

[No. 20,059. Filed December 12, 1902.]

From Jay Circuit Court; J. M. Smith, Judge.

Action by International Building and Loan Association against James W. Racer and others to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under subdivision 2 of §1337j Burns 1901. *Reversed*.

J. W. Headington and O. S. Whiteman, for appellants.

O. H. Adair and J. F. LaFollette, for appellee.

MONKS, J.—Appellee, a building and loan association, organized under the laws of this State, sued appellants to recover judgment upon a contract for the payment of money and to foreclose a mortgage given by appellants on real estate to secure said contract. The court found for appellee, and, over a motion for a new trial, rendered judgment for the amount of the finding, \$211.47, and a decree foreclosing said mortgage.

The only error assigned and not waived calls in question the action of the court in overruling appellants' motion for a new trial.

The provisions of the contract and mortgage sued upon, the articles of association and by-laws and certificate of stock, except as to dates, amounts, and parties, are identical with those in *International, etc., Assn. v. Radebaugh, ante*, 549, the appellant in that case being the appellee in this.

In that case, we did not, and in this we need not, determine whether appellee was required to pay \$100 for each of said shares of stock at the end of six and one-half years from the date the same was issued, or when the monthly dues paid on said shares and the profits apportioned thereto should amount to \$600, the face value thereof, if this should be more than six and one-half years from such date, because, accepting appellee's contention that the latter view is the correct one, under the rules established in the case above cited, the finding of the court was not sustained by the evidence, and was contrary to law.

The contract and mortgage sued upon were executed November 27, 1891, to secure a loan of \$600 to appellant James W. Racer, a shareholder of appellee. Six shares of stock in said association were also assigned by said Racer as collateral security for said loan. The contract sued upon provided for the payment of five per cent. premium and five per cent. interest per annum on \$600, payable monthly. The said Racer, however, received only \$540,—\$60 being deducted and retained by appellee as a gross premium. The

Symons v. National Building, etc., Assn.

monthly dues on the stock were paid for six years and seven months. The premium and interest were also paid for six years and seven months.

There was evidence given at the trial that dues had been paid on said six shares of stock amounting to \$360.90, and that profits amounting to \$174.05 had been apportioned to said stock. The amount of monthly payments of premium and interest for said seventy-nine months was \$395, when said premium and interest on \$540, the amount received by said Racer from appellee, was only \$355.50, showing an overpayment of said premium and interest of \$39.50. Add this sum of \$39.50, and the \$60 gross premium retained by appellee, to the dues paid and dividends declared, and we have the amount of \$634.45, which is \$34.45 more than was necessary to mature the stock.

Judgment reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings not inconsistent with this opinion.

**SYMONS ET AL. v. NATIONAL BUILDING, LOAN
AND SAVINGS ASSOCIATION.**

[No. 19,466. Filed December 16, 1902.]

From Henry Circuit Court; *W. O. Barnard*, Judge.

Suit by the National Building, Loan and Savings Association against Elizabeth and Seth C. Symons to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Transferred from Appellate Court, under §1337u Burns 1901. *Reversed.*

E. H. Bundy and *J. M. Morris*, for appellants.

W. N. Harding, *A. R. Hovey*, *C. S. Wiltzie* and *M. L. Koons*, for appellee.

MONKS, J.—The questions necessary to the decision of this case are the same as those decided in *International, etc., Assn. v. Radebaugh*, ante, 549, and *Racer v. International, etc., Assn.*, ante, 697, and on the authority of those cases this case is reversed, with instructions to sustain appellants' motion for a new trial and for further proceedings not inconsistent with this opinion.

Board, etc., v. Newport.

BOARD OF COMMISSIONERS OF OWEN COUNTY
ET AL. v. NEWPORT.

[No. 19,761. Filed December 19, 1902.]

From Owen Circuit Court; *M. H. Parks*, Judge.

Suit by Richard Newport against the Board of Commissioners of Owen county and others. From a decree for plaintiff, defendants appeal. *Affirmed.*

Willis Hickam, D. E. Beem and J. C. Robinson, for appellants.

G. W. Grubbs, I. H. Fowler and T. H. Spangler, for appellee.

HADLEY, C. J.—All the questions presented by this record are identical with the questions decided in the case of *Board, etc., v. Spangler, ante*, 575, and for reasons given in said former case, the judgment in this cause is affirmed.

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ACCEPTANCE—Of deed, see **DEEDS**, 1, 2, 3; *Horner v. Lowe*, 406.

ADVANCEMENT—To heir, see **PARTITION**, 1; *Sauer v. Schenck*, 373.

ANSWER—In mandamus proceeding, see **MANDAMUS**, 1; *State, ex rel., v. Perry*, 508.

APPEAL AND ERROR—An appeal from the board of commissioners must be taken within thirty days. *Robson v. Richey*, 660.

1. *Assignment of Error.—Names of Parties.*—The assignment of errors on appeal must contain the full names of the parties. The use of initial letters for Christian names is insufficient.
Gunn v. Haworth, 419.
2. *Term-Time Appeal.—Parties.*—A term-time appeal may be taken, under the provisions of §647a Burns 1901, by part only of co-parties against whom a judgment has been rendered, and in such case it is not necessary to name those not appealing in the assignment of errors.
Gunn v. Haworth, 419.
3. *Dismissal for Failure to Join Adverse Parties.*—All parties to a judgment must be made parties in the assignment of errors on appeal therefrom or the appeal will be dismissed.
Kreuter v. English Lake Land Co., 372.
4. *Misjoinder of Causes.*—A judgment will not be reversed for a misjoinder of causes of action.
Brown v. Bernhamer, 538.
5. *Criminal Law.—Contempt.*—An appeal may be taken by the State under §1915 Burns 1901, from the action of the court in dismissing a proceeding for an indirect contempt of court.
State v. Rockwood, 94.
6. *Transcript.—Incorporation of Bill of Exceptions.*—Where what purports to be a bill of exceptions is attached after the clerk's certificate, and is not identified as a bill of exceptions in the cause, it will not be considered on appeal.
Butt v. Lake Shore, etc., R. Co., 490.
7. *Defect in Transcript.—When Cause Affirmed.*—Where the questions sought to be presented by an appellant depend upon the incorporation in the record of a certain bill of exceptions, and such bill is not properly certified by the clerk, which fact had long since been pointed out by appellee in his brief, but no steps were taken by appellant to amend his transcript, the cause will be affirmed.
Butt v. Lake Shore, etc., R. Co., 490.
8. *Evidence.—Bill of Exceptions.—Record.*—In order to make the evidence a part of the record on appeal, the same must be incorporated in a bill of exceptions, which shall be examined and approved by the trial judge as a bill of exceptions, and, when thus

APPEAL AND ERROR—Continued.

- judicially perfected, filed in open court, or in the clerk's office, as a part of the proceedings in the case in accordance with the act of 1897. *Case v. Bennett*, 170.
9. *Bill of Exceptions.—Review.*—A bill of exceptions not signed before filing, and not filed within the time allowed after term, can not be considered on appeal. *Hershtberger v. Kerr*, 367.
10. *Record.—Bill of Exceptions.*—An entry reciting "comes now the State * * and files a bill of exceptions therein as follows," followed by a bill of exceptions containing a recital that it was signed by the judge, on a certain date, sufficiently shows that the bill was signed before it was filed. *State v. Rockwood*, 94.
11. *Bill of Exceptions.—Evidence not in Record.*—Where there was an attempt to incorporate the evidence in the record, under section six of the act of 1899 (Acts 1899, p. 384), which section, pending the appeal, was held unconstitutional, and there had been no substantial compliance with the provisions of the previous act of 1897 (Acts 1897, p. 244), the evidence is not in the record. *Chicago, etc., R. Co. v. Woodard*, 541.
- 11½. *Precipe.—Transcript.—Bill of Exceptions.*—Where the precipe filed by appellant directed the clerk to "prepare and certify a full, true, and complete transcript of the following proceedings, papers on file, judgment and decree" in the cause, the action of the clerk in certifying the original bill of exceptions was unauthorized, and the same is no part of the record on appeal. *Drew v. Town of Geneva*, 364.
12. *Record.—Evidence.—Special Bill of Exceptions.*—A special bill of exceptions, under §642 Burns 1901, must show that the evidence embraced in the special bill was all the evidence given upon the issue to which the proffered evidence related. *Standish v. Bridgewater*, 386.
13. *Mutilation of Record.—Dismissal.*—The removal from the record by the appellant, of the original bill of exceptions, and the filing of a new one in accordance with the provisions of the invalid act of March 11, 1901, while a mutilation of the record, is not a sufficient cause for dismissal of the appeal where the appellant acted in good faith. *Johnson v. Gebbauer*, 271.
14. *Instructions.—Instructions given or refused* can not be considered on appeal, when they only appear in the record as a part of the motion for a new trial. *Andrysiak v. Satkoski*, 428.
15. *Bill of Exceptions.—Instructions.*—Instructions given or refused can not be presented on appeal, under §638a Burns 1901, by an original bill of exceptions. *Andrysiak v. Satkoski*, 428.
16. *Instructions.—Rules of Court.*—The action of the court in giving or refusing to give certain instructions will not be reviewed on appeal, where neither the pages and lines of the record where the instructions may be found, nor the substance of any of them are given as required by the rules of the Supreme Court. *Citizens St. R. Co. v. Stockdell*, 25.
17. *Record.—New Trial.—Affidavits.*—Alleged error in overruling a motion for a new trial because of newly discovered evidence will not be considered on appeal, where the affidavits in support thereof are not made a part of the record by bill of exceptions or order of court. *Creamery, etc., Co. v. Hotsenpiller*, 99.
18. *Instructions.—Exception.*—An exception to an instruction by a written indorsement on the margin thereof in the words: "Given and excepted to at the time by the defendant," signed by the judge, is not a sufficient compliance with §544 Burns 1901 pro-

APPEAL AND ERROR—Continued.

- viding the manner of reserving exceptions to the giving or refusing of instructions without a bill of exceptions, where the indorsement was not dated.
Malott v. Hawkins, 187.
19. *Trial.—Misconduct of Witness.*—No question is presented on appeal as to the misconduct of plaintiff while on the witness-stand, where no objection was made to such conduct at the time.
Citizens St. R. Co. v. Stockdell, 25.
20. *Assignment of Error.—Exception.*—The action of the court in sustaining the separate demurrers of two defendants to plaintiff's complaint involved two rulings, and in order to question such rulings on appeal an exception must be taken to each.
Noonan v. Bell, 329.
21. *Joint Assignment of Errors.*—A joint assignment of error based upon the action of the court in overruling a demurrer to a complaint is not available where the complaint was good as to some of the appellants joining in the assignment of errors.
Bush v. McBride, 663.
22. *Joint Assignment of Error.*—A joint assignment that the court erred in overruling a demurrer to a complaint of several paragraphs is not available if any paragraph thereof is good.
Chicago, etc., R. Co. v. Woodard, 541.
23. *Joint Assignment of Error.*—A joint assignment of error as to the action of the court in sustaining demurrers to two paragraphs of complaint presents no question if either paragraph is bad.
Hague v. First Nat. Bank, 636.
24. *Assignment of Error.—Constitutional Question.—Review.*—An assignment of error that a certain specified act of the legislature is unconstitutional, is improper, and presents no question for review.
Standish v. Bridgewater, 386.
25. *Failure of Appellee to File Brief.—Record.—Rules.*—In the absence of a brief by appellee, the Supreme Court, under its rule twenty-two, will treat as conclusive the statement in appellant's brief in reference to the record.
McElwaine-Richards Co. v. Wall, 557.
26. *Failure of Appellee to File Brief.—Confession of Error.*—Where the appellee, within the time allowed, fails to file a brief in support of the judgment assailed, such failure may be regarded as a confession of error, and the cause reversed without considering the appeal on its merits.
People's Nat. Bank v. State, ex rel., 353.
27. *Failure to Discuss Error.—Waiver.*—Exceptions to the decisions of the court upon the motion of appellant for an order of court requiring the jury to make further answers to certain interrogatories are waived by failure of appellant's counsel to discuss them.
Citizens St. R. Co. v. Stockdell, 25.
28. *Pleading.—Amendment.—Review of Original.*—The Supreme Court will not review a ruling on an original paragraph of complaint which has been superseded by an amended complaint.
Hershberger v. Kerr, 367.
29. *Motion to Strike Out.—Review.*—A motion to strike out part of a complaint will not be reviewed on appeal, where it has not been made a part of the record by bill of exceptions or order of court.
Chicago, etc., R. Co. v. Woodard, 541.
30. *Motion to Strike Out.—Harmless Error.*—The ruling of the court denying a motion to strike out parts of a pleading, even if wrong, does not constitute reversible error.
Chicago, etc., R. Co. v. Woodard, 541.

APPEAL AND ERROR—Continued.

31. *Exceptions.—Court Questioning Witnesses.*—The action of the court in interrogating appellant's witnesses will not be reviewed on appeal, where no objections or exceptions were reserved.
Indianapolis St. R. Co. v. Hockett, 677.
32. *Constitutionality of Statute.*—Where an indictment was properly quashed for reasons other than that the statute on which it was based was unconstitutional, the question of the constitutionality of the statute is not presented on appeal within the meaning of §1387h Burns 1901.
State v. Wright, 422; State v. Barnett, 432.
33. *Misdemeanor.—Construction of Statute.—Intoxicating Liquors.*—The question of "the proper construction of a statute" within the meaning of §8 of the act of 1901 (Acts 1901, p. 565), containing an exception to the provision of said act denying the right of appeal in cases of misdemeanor is not presented by a motion to quash an affidavit charging appellant with violating §7283c Burns 1901, by permitting persons other than members of his family, on a legal holiday, to enter his place of business wherein he was engaged in the sale of intoxicating liquors, because the affidavit did not charge that appellant was the proprietor of a room in which intoxicating liquors were sold by virtue of a "license" under the laws of the State of Indiana, the statute being plain in its provisions.
Deane v. State, 313.
34. *Highways.—Motion to Reject Report of Viewers.—Record.*—A motion to reject the report of viewers, on the trial of a remonstrance for damages in a proceeding for the opening of a highway, can not be reviewed on appeal where it was not brought into the record by bill of exceptions or otherwise.
Fifer v. Ritter, 8.
35. *Highways.—Motions in Commissioners' Court.*—A motion made in highway proceedings before the board of county commissioners, which was not renewed on appeal to the circuit court, can not be reviewed on appeal to the Supreme Court.
Fifer v. Ritter, 8.
36. *Receivers.*—On appeal from an interlocutory order appointing a receiver, the insufficiency of the facts stated in the complaint, including the improper joinder of parties plaintiff, will be disregarded, except so far as it relates to the appointment prayed for.
Chicago, etc., R. Co. v. Kenney, 72.
37. *Master and Servant.—Judgment.*—A judgment for personal injuries will not be reversed because the evidence as to some features of the case can not be said to be strong or of great weight, where there is evidence to sustain the general verdict and the material special findings of the jury in answer to interrogatories submitted.
Creamery, etc., Co. v. Hotsenpiller, 99.
38. *Index.—Marginal Notes.—Presumption.*—Where a record comes to the Supreme Court with a proper index and marginal notes, it will be presumed, in the absence of a showing that they were added after the filing, that they were added before the transcript was filed.
State v. Patton, 243.
39. *Harmless Error.*—Overruling a demurrer to a bad answer was harmless, where all of the facts which could have been given in evidence under it were admissible under the cross-complaint.
State v. Hindman, 586.
40. *Instructions.—Harmless Error.*—A judgment will not be reversed for errors in the giving of instructions, when, under the facts disclosed by the record, the appellant, who was plaintiff in the trial court, could not have recovered in any event.
Barter v. Lusher, 381.

APPEAL AND ERROR—Continued.

41. *Pleading.—Harmless Error.*—In an action on an insurance policy by the administrator of the insured, error in sustaining a demurrer to a cross-complaint by one claiming the policy as assignee was prejudicial error, although the defense might have been made under the general denial; since cross-complainant was entitled to have the issues so formed that she could have recovered affirmatively under her cross-complaint.

Davis v. Brown, 644.

42. *Petition for Rehearing.—Court Can Not Extend Time for Filing.*—The court has no power to extend the time for filing a petition for a rehearing beyond the time fixed by §874 Burns 1901.

Dudgeon v. Bronson, 562.

43. *Rehearing.—Waiver.*—Questions not presented on the original hearing will not be considered on a rehearing.

Indiana Power Co. v. St. Joseph, etc., Power Co., 42.

APPEARANCE—

1. *Agreement to Continuance.*—An agreement by defendant's attorney to a continuance constitutes an appearance.

Kirkpatrick, etc., Co. v. Central Electric Co., 639.

2. *Jurisdiction.—Corporations.*—Where the attorney of a corporation in an action against the corporation acknowledged service of notice to take depositions; was present in court at the publication of the depositions and made no objection thereto; was present when a continuance was requested by plaintiff, and stated that it did not matter when it was tried, that plaintiff could have all the time it desired so far as he was concerned, whereupon such cause was continued as by agreement, such action on the part of the attorney amounted to an appearance.

Kirkpatrick, etc., Co. v. Central Electric Co., 639.

3. *Special Appearance.—Waiver.*—By the filing of an answer to the merits, a defendant waives all objections to the jurisdiction of his person, but not the right to question the ruling on appeal.

American Mut. Life Ins. Co. v. Mason, 15.

ARREST—Without Warrant, see FALSE IMPRISONMENT, 3; *Harness v. Steele, 286.*

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1. *Complaint.—Implied Promise to Pay.*—A complaint alleging that a burial casket was furnished and certain services rendered "at the special instance and request of defendant," sufficiently alleges an implied promise to pay the reasonable value thereof.

Cox v. Peltier, 355.

2. *Parol Promise.—Statute of Frauds.*—An unconditional parol promise of a person to pay for goods furnished at his special instance and request to a third party is not violative of the statute of frauds which requires that a promise to answer for the debt of another shall be in writing.

Cox v. Peltier, 355.

ASSUMPTION OF RISK—By tenant, see LANDLORD AND TENANT 10; *Indianapolis Abattoir Co. v. Temperly, 651.*

ATTACHMENT AND GARNISHMENT—

1. *Judgment.—Payment.—Bar of Action by Original Creditor.*—Where a garnishee, in compliance with a judgment of a foreign court of competent jurisdiction, has been compelled to pay a debt to another, after notice of the suit to the principal debtor and a full disclosure of the material facts known to the garnishee, such judgment may be pleaded in bar of an action on the claim by the original creditor. *Baltimore, etc., R. Co. v. Adams, 688.*
2. *Judgments.*—The fact that the original creditor obtained a judgment on his claim in this State before a judgment thereon in attachment was rendered in another state was in no wise inconsistent with the latter judgment. *Baltimore, etc., R. Co. v. Adams, 688.*

ATTORNEY AND CLIENT—

Contract of Employment.—Validity.—Public Policy.—A contract between an attorney and client, by the terms of which the attorney agrees to prosecute a suit for a certain per cent. of the amount recovered, and that the client shall not enter into any compromise of the claim unless the attorney "is present and directs the settlement," is void as against public policy. *Davis v. Chase, 242.*

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Contracts for Construction of Schoolhouse.—Liability for Material Furnished.—An agreement on the part of a contractor to provide material and labor, and construct a schoolhouse at his own cost, and that the school township should not be answerable or accountable therefor, is not the equivalent of a promise to pay the debts contracted for such purpose; and an action can not be maintained by a material man, on a bond given to secure the performance of such contract, for material furnished the contractor, and used in the construction of such building.

Greenfield Lumber, etc., Co. v. Parker, 571.

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BRIEF—Failure to discuss errors assigned, see APPEAL AND ERROR, 27; *Citizens St. R. Co. v. Stockdell*, 25.

Failure of appellee to file brief, see APPEAL AND ERROR, 25, 26; *McElwaine-Richards Co. v. Wolf*, 557; *People's Nat. Bank v. State*, *ex rel.*, 353.

BROKERS—

1. *Commissions.—Complaint.*—A complaint by a real estate broker for commission alleging that defendant employed him to sell certain real estate agreeing to pay him a specified amount if he found a purchaser, and that he sold the land, that the owner executed a deed and received the purchase money, but refused to pay the commission, is good against a demurrer.

Adams v. McLaughlin, 23.

2. *Commissions.—Evidence.*—In an action by a broker for commission for the sale of real estate, evidence offered by defendant that he had employed another broker who attempted to dispose of the farm to certain persons who had obtained information concerning it from plaintiff was properly rejected.

Adams v. McLaughlin, 23.

BUILDING AND LOAN ASSOCIATIONS—

1. *Premium.*—A building and loan association can only require the payment of premium in gross, or instalments. It can not require both. *International, etc., Assn. v. Radebaugh*, 549.

2. *Interest.—Premium.—Maturity of Stock.*—A building and loan association contract provided that the stock should mature at the end of six and one-half years from the date of issue, or when the monthly dues paid and profits apportioned should amount to \$3,000, the face value thereof. The borrower received but \$2,700, the association retaining \$300 as a gross premium, and paid monthly dues, interest, and premium on the \$3,000 for six years and eight months. The dues paid amounted to \$1,560, and profits amounting to \$1,083.06 had been apportioned to the stock. *Held*, that the overpayment of interest and premium amounting to \$199.50, and the gross premium of \$300 retained, should be credited to the borrower's account, and when so credited the stock would amount to \$3,088.56. *International, etc., Assn. v. Radebaugh*, 549.

BUNKO-STEERING—Sufficiency of affidavit and information, see CRIMINAL LAW, 3, 4; *Johns v. State*, 413.

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Act authorizing Auditor of State to collect loan of State University endowment fund, see MORTGAGES, 15; *McElwaine-Richards Co. v. Gifford* 534.

1. *Statutes.—Title.*—Section 19 of article 4 of the Constitution providing that "every act shall embrace but one subject and matters properly connected therewith" does not require that the title shall be an epitome of the act. It is the subject of the act, and not the matters properly connected therewith, that the Constitution requires to be expressed in the title. *Parks v. State*, 211.
2. The constitutionality of a statute will not be passed upon if the question at issue can be passed upon otherwise.
Hart v. Smith, 182; *Chicago, etc., R. Co. v. Glover*, 166.
3. *Review.*—Where an appeal is taken under §1337h Burns 1901, for the purpose of testing the constitutionality of a criminal statute, the validity of the statute will not be passed upon if the indictment is insufficient.
State v. Wright, 394.
4. *Police Power.—Statutes.—Discretion of Legislature.*—While laws enacted by a state under its police power must be wholesome and reasonable, a very large measure of authority is vested in the legislative department to determine what is reasonable and wholesome.
Parks v. State, 211.
5. *Local Laws.—Improvement of Highways.—Gravel Road Bonds.*—The act of March 9, 1901 (Acts 1901, p. 283), to legalize the proceedings of the board of commissioners of Owen county relative to the construction of gravel or macadamized roads, being special and local, is unconstitutional.
Board, etc., v. Spangler, 575.
6. *Local Laws.—Improvement of Highways.—Gravel Road Bonds.*—The act of March 4, 1899 (Acts 1899, p. 422), providing that the act of February 7, 1899 (Acts 1899, p. 26), limiting the issuing of bonds for the improvement of highways shall not apply to counties having a population between 15,000 and 15,060 as shown by the census of 1890, is local, and violative of §22, of article 4, of

CONSTITUTIONAL LAW—Continued.

the Constitution, which provides that the General Assembly shall not pass local or special laws "For laying out, opening, and working on highways. * * * For the assessment and collection of taxes for * * * road purposes."

Board, etc., v. Spangler, 575.

7. *Physicians.—Licenses.—Privileges and Immunities.*—The privileges and immunities clause of the fourteenth amendment to the federal Constitution has no application to the denial of the right to practice medicine without first procuring a license as provided by §§7318-7323e Burns 1901. *Parks v. State, 211.*

8. *Legislature No Control Over Court Records.—Extending Time for Filing Bill of Exceptions.*—The act of March 11, 1901 (Acts 1901, p. 511), giving to trial courts in certain cases the power to extend the time of filing bills of exceptions, is an attempt by the legislature to exercise control over the records of the court, and is in violation of §1, article 3, of the State Constitution which provides for the exclusive character of the three departments of government. *Johnson v. Gebhauer, 271.*

9. *Extending Time for Filing Bill of Exceptions.—Power of Legislature.*—The right of the prevailing party in the trial court to require that the bill of exceptions should be settled by the judge, and filed within the time then fixed by such judge, is a vested right, and the act of March 11, 1901, giving the trial courts in certain cases the power to extend the time of filing bills of exceptions, is unconstitutional, as impairing the obligation of contracts. *Johnson v. Gebhauer, 271.*

CONTEMPT—Appeal from dismissal of contempt proceeding, see **APPEAL AND ERROR**, 5; *State v. Rockwood, 94.*

Grand Jurors.—Affidavit.—An affidavit in a proceeding against grand jurors for an indirect contempt of court charging that "said jurors, or at least some of them," were guilty of the misconduct charged, is bad for uncertainty in the description of the jurors intended to be charged with the contempt. *State v. Rockwood, 94.*

CONTRACTS—Assumption of mortgage indebtedness, see **MORTGAGES**, 5-7; *Whicker v. Hushaw, 1.*

Implied promise, see **ASSUMPSIT**, 1, 2; *Cox v. Peltier, 355.*

For construction of schoolhouse, see **BONDS**; *Greenfield Lumber, etc., Co. v. Parker, 571.*

Between attorney and client, see **ATTORNEY AND CLIENT**; *Davis v. Chase, 242.*

Signed by only one party, see **FRAUDS, STATUTE OF**; *Burke v. Mead, 252.*

Pleading of, see **PLEADING**, 3; *Davis v. Chase, 242.*

1. *Mutuality.*—It is enough to give mutuality to the contract that is entire in its character, if there is a consideration on both sides for its performance. *Jordan v. Indianapolis Water Co., 337.*

2. *Uncertainty.—What is Implied.*—The law is a component part of every contract that contains provisions which are open to legal interpretation; therefore terms which the law implies need not be expressed. *Burke v. Mead, 252.*

3. *To Convey Realty.—Mutuality of Parties.*—A written contract to sell real estate, resting upon a sufficient consideration, signed

CONTRACTS—Continued.

by the owner and accepted by the purchaser, is not invalid for want of mutuality.

Burke v. Mead, 252.

4. *For Benefit of Third Person.*—A contract for the benefit of a third person does not become the contract of such person, creating a liability in his favor, until by some overt act of acceptance he elects to make the contract his.

Johnson v. Central Trust Co., 606.

5. *Complaint for Breach.—Pleading.—Performance of Condition Precedent.*—In pleading the performance of the conditions precedent in a contract, it is sufficient, under §370 R. S. 1881, to allege generally that the party "performed all the conditions on his part;" but if a party does not avail himself of said statute, by making the general allegation thereby authorized, he must allege the performance of all conditions precedent with the particularity required by the rules of the common law.

Collins v. Amiss, 593.

6. *Consideration.—Uncertainty.—Parol Evidence.—Statute of Frauds.*—Where a contract for the sale of real estate states the consideration indefinitely parol evidence is admissible to explain the ambiguity.

Burke v. Mead, 252.

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE; MASTER AND SERVANT; RAILROADS.

Mixed Question of Law and Fact.—Railroad Crossings.—While §359a Burns 1901, placing the burden of proving contributory negligence in personal injury cases upon the defendant does not abate the legal requirements as to the care that a traveler crossing a railroad track must use, nor change the rule that it is presumed that the traveler saw and heard, or was heedless of that which as an ordinarily prudent man, he ought to have taken notice of; but where the question as to contributory negligence stands as a mixed question of law and fact, the statute may have the effect of requiring such question to be submitted to the jury.

Malott v. Hawkins, 127.

CORPORATIONS—Sufficient process, see PROCESS; Kirkpatrick, etc., Co. v. Central Electric Co., 639.

Penalty for failure to release mortgage does not apply to corporations, see MORTGAGES, 11; *Studebaker Bros. Mfg. Co. v. Morden*, 173.

Penalty for failure to make monthly payment of wages, see MASTER AND SERVANT, 13, 14; *Chicago, etc., R. Co. v. Glover*, 166.

1. *Powers too Broad.—De Jure Corporation.*—Where the powers of a corporation as set out in its articles are broader than authorized by the statute under which the corporation is organized the organization does not become a *de jure* corporation.

Burke v. Mead, 252.

2. *Incidental Powers.*—The manufacture and sale of "all kinds of electrical appliances, apparatus and supplies" is not an incidental power of a corporation organized for the purpose of "manufacturing, storing, selling, and distributing electricity for light, heat, and power," etc.

Burke v. Mead, 252.

3. *Directors as Creditors.—Preference.*—An insolvent manufacturing corporation does not hold its property in trust for its creditors, or subject to any lien, legal or equitable, in their favor, in any other manner than such property is held by an insolvent indi-

CORPORATIONS—Continued.

vidual debtor; and such corporation may prefer creditors for whose claims certain directors were surety, or legally bound, although the votes of such directors were necessary to authorize the execution of the instrument creating the preference. *Hadley, J., dissents. Nappanee Canning Co. v. Reid, Murdoch & Co., 614.*

4. *Railroads.—Appointment of Receiver.—Jurisdiction of Court.*—Under the act of 1899 (Acts 1899, p. 13) providing that any action against any corporation organized under the law of this State may be brought in any county where such corporation has an office or agency for the transaction of business, the court of a county in which a railroad organized in this State has an office or agency has jurisdiction of an action for the appointment of a receiver of such railroad company although the principal office of the company is in another county in this State.

Chicago, etc., R. Co. v. Kenney, 72.

5. *Charter.—Amendments.—Railroads.*—The act of 1897 (Acts 1897, p. 59) amending the act of 1847 (Local Laws 1847, p. 77), creating a corporation with power to construct a railroad, providing for an accounting to the use of the common schools, authorizing the Attorney-General to demand such accounting, and to institute suit upon failure so to do, is valid as providing a remedy for enforcing the preëxisting charter obligations of the corporation.

Terre Haute, etc., R. Co. v. State, ex rel., 438.

6. *Railroads.—Amendment of Charter.*—The amendment of 1851 (Local Laws 1851, p. 80), of the act of 1847 (Local Laws 1847, p. 77), creating a corporation with power to construct a railroad, and imposing certain obligations, whereby the corporation was relieved of the construction of a portion of the road and the power conferred upon another corporation upon the request of the former, and the acceptance by such corporation in 1873 of the general railroad law of 1852, did not relieve the corporation from unperformed duties assumed by it under its charter contract of 1847.

Terre Haute, etc., R. Co. v. State, ex rel., 438.

7. *Railroads.—Charter.—Construction.—Capital Employed.*—The words "the full sum invested" and "capital employed" as used in section twenty-three of the act of 1847 (Local Laws 1847, p. 77), providing that when the aggregate amount of dividends declared by the railway company created by the act shall amount to "the full sum invested" the legislature may so regulate the tolls and freights that not more than fifteen *per centum* shall be divided on "the capital employed" embraces only such sums as were contributed directly by those who purchased the corporation stock for the construction of the road and the sum paid for bonds that were issued and used for construction and subsequently converted, under their provisions, into shares of stock.

Terre Haute, etc., R. Co. v. State, ex rel., 438.

8. *Railroads.—Dividends.—Tolls.—Regulation by State.—Statutes.*—The provision of section twenty-three of the act of 1847 (Local Laws 1847, p. 77), creating a corporation with power to construct a railroad, "that when the aggregate amount of dividends declared shall amount to the full sum invested and ten *per centum* per annum thereon, the legislature may so regulate the tolls and freights that not more than fifteen *per centum* per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and reserving such portion as may be necessary for future contingencies, shall be paid over to the Treasurer of State for the use of the common schools," etc., does not require the legislature, as a condition precedent to the State's

CORPORATIONS—Continued.

right to the earnings in excess of fifteen *per centum*, to regulate the tolls and freights of the company.

Terre Haute, etc., R. Co. v. State, *ex rel.*, 438.

COSTS—Liability of special administrator, see EXECUTORS AND ADMINISTRATORS, 1, 2, 3; *Bruning v. Golden*, 199.

In construction of drain, see DRAINS, 1; *Carter v. Buller*, 52.

COUNTIES—

Claim.—Allowance by Commissioners.—Mandamus to Compel Auditor to Issue Warrant.—Since the county commissioners act in an administrative and not in a judicial capacity, the order of the board allowing a claim is only *prima facie* evidence of its correctness; and in a mandamus proceeding to compel the county auditor to issue a warrant for a claim allowed by the commissioners, such auditor may question the legality of the allowance.

State, ex rel., v. Perry, 508.

COUNTY COMMISSIONERS—Allowance of claim is only *prima facie* evidence of its correctness, see COUNTIES; *State, ex rel.*, v. Perry, 508.

1. *Vacating Order Establishing Highway.*—The statute which grants all the power possessed by the board of county commissioners does not confer upon such board authority to annul or modify a judgment or grant a new trial; and where the board of commissioners has made an order establishing a highway and such order has been recorded, it has no power to vacate it, either at the same or subsequent term.

Robson v. Richey, 660.

2. *Appeal.*—An appeal from the decision of the board of commissioners must be taken within thirty days. *Robson v. Richey*, 660.

COURTS—Recognizance forfeited after adjournment of court term, see JUDGMENT, 10, 11, 12; *Stute v. Hindman*, 586.

1. *Appointment of Receiver.—Jurisdiction.—Railroads.—Corporations.*—Where the court had jurisdiction of the person of the defendant, the judge of the court, at chambers, in vacation, likewise possessed it.

Chicago, etc., R. Co. v. Kenney, 72.

2. *Records.*—The records of a court are subject to its own control, and when jurisdiction has attached they may not be diminished or altered without the consent of the court in which the cause is pending, excepting only where such change is directed by some superior or appellate court authorized by law to make such order.

Johnson v. Gebhauer, 271.

3. *Records.—Transcript.—Mutilation.—Appeal*—Where a transcript is filed in the proper court upon appeal, and when notice is given to the appellee, if necessary, the jurisdiction of the court to which the appeal is taken is complete, and the transcript becomes a record of the court, and any addition to or diminution thereof without the leave of the court is a mutilation.

Johnson v. Gebhauer, 271.

COVENANT—Breach of covenant in lease, see LANDLORD AND TENANT, 4, 5, 6; *Indiana Nat. Gas, etc.*, Co. v. Hinton, 398.

CRIMINAL LAW—See MURDER; PERJURY; PRIZE-FIGHTING.

Penalty for failure to release mortgages does not apply to corporations, see MORTGAGES, 11; *Studebaker Bros. Mfg. Co. v. Morden*, 173.

CRIMINAL LAW—Continued.

1. *Affidavit and Information.—Physicians.*—An affidavit and information, in the form prescribed by §7323c Burns 1901, charging defendant with unlawfully practicing medicine without first having procured a license so to do, sufficiently states the nature of the accusation, although under the statute various acts may enter into the offense. *Parks v. State, 211.*
2. *Good and Bad Counts of Indictment.—Presumptions on Appeal.*—Where there is one sufficient count in an indictment, and a general verdict of guilty is returned on which judgment is rendered, it will be presumed on appeal that the judgment was rendered on the good count. *Parks v. State, 211.*
3. *Pleading.*—Where a criminal statute provides a definition of an offense and states specifically what act constitutes it, it is sufficient to charge the offense in the language of the statute; but where the definition of the offense contains generic terms, it is not sufficient to allege the species of the crime, but the particulars thereof must be stated. *Johns v. State, 413.*
4. *Pleading.—Bunko-Steering.*—An information for bunko-steering, charging that defendants, by "duress and fraud," compelled another to lose and part with a large amount of money on a foot-race, is insufficient in failing to state the nature of the fraud and duress, though stated in the language of the statute defining the crime. *Johns v. State, 413.*
5. *Unlawful Use of Labeled Bottles.—Indictment.*—An indictment, under §§8678-8680c Burns 1901, for filling with beer bottles belonging to another, is bad for failing to charge that such act was done with intent to defraud the owner of the bottles. *State v. Wright, 422.*
6. *Infringement.—Indictment.*—An indictment for the violation of §8680b Burns 1901, prohibiting infringement of trade-marks on certain bottled beverages, which fails to charge that defendant filled or caused to be filled any bottle or siphon with a liquid mentioned in the statute, is insufficient. *State v. Wright, 394.*
7. *Purchasing Labeled Bottles.—Trade-Mark.—Indictment.*—An indictment charging defendant with purchasing soda water and mineral water bottles with the intent to defraud the owner in violation of §8680b Burns 1901, must allege facts showing that the owner of the bottles, before the purchase, had fully complied with all of the requirements of §8678 Burns 1901, relative to procuring a trade-mark thereon. *State v. Barnett, 432.*
8. *Purchasing Labeled Bottles.—Indictment.—Words and Phrases.*—An indictment charging defendant with purchasing labeled bottles with intent to defraud the owner, in violation of §8680b Burns 1901, which charged that the offense was committed on the day the indictment was returned, and alleged that the owner of the bottles "then and there and theretofore" filed with the clerk a written description, etc., and the clerk "then and there" caused a certified copy of such description to be published for not less than two weeks, etc., is insufficient, since the words "then and there" imply that the act of compliance with the statute was done on the same day the offense was committed, and the publication for two successive weeks could not have been made before the offense charged was committed; and the words "then and there and theretofore" are contradictory, and leave the time of such filing uncertain. *State v. Barnett, 432.*
9. *Wife Desertion.—Limitation of Action.*—The crime of wife desertion described in §2254 Burns 1901, is not a continuing offense,

CRIMINAL LAW—Continued.

and, after two years from the time the husband leaves his wife, prosecution therefor is barred by the statute of limitations.

State v. Langdon, 377.

10. *Larceny.—Embezzlement.—Joinder of Offenses in Indictment.—New Trial.—Former Jeopardy.*—Where defendant is convicted for larceny, under an indictment in two counts, one charging larceny and the other embezzlement, but both growing out of the same transaction, the granting of a new trial upon defendant's motion opens the case for retrial upon the count on which he was acquitted as well as the one on which he was convicted.

State v. Balsley, 395.

11. *Evidence.—Acts and Declarations of Third Party.—Admissibility.*—Where on the trial of one charged with a crime, a common purpose between defendant and her husband to carry out the unlawful act has been established by proper evidence, the acts and declarations of the husband in furtherance of the common purpose are admissible in evidence whether made in the presence of the defendant or not.

Freese v. State, 597.

12. *Self-Defense.—Reasonable Doubt.—Instructions.*—In a prosecution for an assault and battery with felonious intent, in which the defendant sought to justify his act on the ground of self-defense, the court erred in instructing the jury to the effect that defendant was required to establish such defense beyond a reasonable doubt; since it is the duty of the jury in such case if the evidence raises a reasonable doubt in their minds as to whether any material fact favorable to such defense has been proved to give the defendant the benefit of the doubt and find the fact in question in his favor.

Clark v. State, 60.

DAMAGES—See CARRIERS; MASTER AND SERVANT; NEGLIGENCE; RAILROADS; STREET RAILROADS.

Resulting from defective gas-pipes, see **LANDLORD AND TENANT**, 11; *Indianapolis Abattoir Co. v. Temperly, 651.*

For land condemned by water company, see **EMINENT DOMAIN**, 2; *Indiana Power Co. v. St. Joseph, etc., Power Co., 42.*

Wounded pride as an element of, see **FALSE IMPRISONMENT**, 5; *Harness v. Steele, 286.*

In location of highway, see **HIGHWAYS**, 1, 2, 3, 4; *Fifer v. Ritter, 8.*

Exemplary damages, see **FALSE IMPRISONMENT**, 6; *Harness v. Steele, 286.*

When Not Excessive.—A judgment in an action for personal injuries will not be reversed on the ground that excessive damages were awarded, where it does not appear that the jury in awarding damages was influenced by prejudice, passion, partiality, or corruption.

Creamery, etc., Co. v. Hotsenpiller, 99.

DEEDS—

1. *Acceptance.—Waiver of Prior Executory Agreements.*—When a deed has been delivered and accepted, it is deemed, in the absence of fraud or such mistake as equity will relieve against, a complete relinquishment of conflicting reservations in any prior executory contract relative to the conveyance.

Horne v. Loue, 406.

2. A grantee received a deed from the grantor, and took it to the office of the county recorder for record, when he found that certain

DEEDS—Continued.

of the lots which it had been the intention to convey had been omitted. He paid the record fee, and asked that the lots described in the deed be transferred to him for taxation, but, without having the deed recorded, returned it for correction. *Held*, that there had been an acceptance of the deed. *Horner v. Lowe*, 406.

8. *Acceptance.—Failure of Title.*—In the absence of fraud or relievable mistake, the grantee who accepts a deed without covenants can not successfully defend against a failure of title.

Horner v. Lowe, 406.

4. *Life Estate.—Remainder.—Construction.*—Upon the death of the father, intestate, the children quitclaimed their two-thirds interest in certain real estate to their mother for the term of her life conditioned that the mother would not convey or encumber the same, and would pay all the debts of her husband, and that at her death all of said real estate should go to the heirs of herself and husband. The mother by a writing, which was a part of the deed, and which was duly acknowledged, accepted the same and agreed to be bound by its conditions. *Held*, that the deed operated as a conveyance to their mother for her life of the two-thirds held by the children, and as a conveyance to them of her one-third, subject to an estate for her own life therein.

Adams v. Alexander, 175.

DEFAULT—In suit for specific performance, see **SPECIFIC PERFORMANCE**, 1; *Burke v. Mead*, 252.

DEMAND—When demand of assignor inures to assignee, see **EXECUTORS AND ADMINISTRATORS**, 6; *Brown v. Bernhamer*, 538.

DESCENT AND DISTRIBUTION—Effect of widow's renunciation of will, see **WILLS**, 2; *Murphey v. Brown*, 106.

DESEPTION—Of wife not continuing offense, see **CRIMINAL LAW**, 9; *State v. Langdon*, 377.

DIRECTORS—Preference by insolvent corporation, see **CORPORATIONS**, 3; *Nappanee Canning Co. v. Reid, Murdoch & Co.*, 614.

DISMISSAL AND NONSUIT—Dismissal of drainage proceeding, see **DRAINS**, 3; *Oathout v. Seabrooke*, 529.

DRAINS—

1. *Account of Construction Commissioner.—Costs.*—A petition was filed by a party in interest reciting that the construction commissioner of a drain, established under §5622 *et seq.* Burns 1901, was about to accept the drain as completed, which in fact was incomplete, and such proceedings were had that a trial resulted, and thereafter by agreement of the parties, three civil engineers were appointed to examine the drain and make a report thereon. The report was such that the court found that the drain was not completed, and it ordered the commissioner to complete the same according to the specifications. After completing the drain he filed his account as construction commissioner claiming credit for disbursements made in carrying on the controversy over the completion of the ditch, including court costs and attorney's fees. *Held*, that the charges were properly disallowed.

Carter v. Buller, 52.

2. *Compensation of Commissioner.—Evidence.*—No error was committed in allowing a moiety of a drain commissioner's claim in the ab-

DRAINS—Continued.

sence of any direct evidence that he did not serve the number of days for which he claimed compensation, where the facts showed that he claimed for more days than there were secular days embraced within the time the work was constructed.

Carter v. Buller, 52.

8. *Dismissal of Proceedings by County Commissioners.—Appeal.*—No appeal will lie to the circuit court from a judgment of dismissal rendered by the board of county commissioners upon a negative report of reviewers in a proceeding to establish a ditch, under §5655 Burns 1901.

Oathout v. Seabrooke, 529.

EASEMENTS—

Private Road.—Way of Necessity.—The fact that a way sixteen feet wide which has been recognized and in use for twenty-five years is so low and wet that plaintiff can not pass over the same without inconvenience and difficulty, does not entitle him to an increase in the width of the road.

Dudgeon v. Bronson, 562.

EMINENT DOMAIN—

1. *Hydraulic Companies.—Waters and Water Courses.*—A power company organized under §4827 *et seq.* Burns 1901, authorizing any company organized under its provision to appropriate land for such use, may, by filing with the clerk of the court an instrument of appropriation, as required by such statute, condemn and appropriate, under the right of eminent domain, lands owned and held by another power company as a mere private individual upon which the latter company was preparing to construct similar works but had failed to file appropriation proceedings as provided by statute.

Indiana Power Co. v. St. Joseph, etc., Power Co., 42.

2. *Damages.—Hydraulic Companies.—Waters and Water Courses.*—In a proceeding by a water company to appropriate land under §4827 *et seq.* Burns 1901, for the construction of its plant, the measure of damages for land taken from a similar company which had not complied with the statute so as to enable it to hold the land as against the power of eminent domain, given by such statute, is the value of the land taken; since no franchise had been acquired by the latter company.

Indiana Power Co. v. St. Joseph, etc., Power Co., 42.

EMPLOYERS LIABILITY ACT—See MASTER AND SERVANT.**EVIDENCE—**

Judge as witness, see JUDGMENT, 12; *State v. Hindman, 586.*

In explanation of written contract, see CONTRACTS, 6; *Burke v. Mead, 252.*

Acts and declarations of third party, see CRIMINAL LAW, 11; *Freese v. State, 597.*

Of insanity in prosecution for murder, see MURDER, 2; *Freese v. State, 597.*

Cause will not be reversed on weight of evidence, see APPEAL AND ERROR, 37; *Creamery, etc., Co. v. Hotsenpiller, 99.*

Incorporation in record on appeal, see APPEAL AND ERROR, 11, 12; *Chicago, etc., R. Co. v. Woodard, 541; Standish v. Bridgewater, 386.*

EVIDENCE—Continued.

1. *Books of Account.*—*Res Gestæ.*—As sawlogs were delivered to the purchaser at his sawmill, the measurements of such purchaser were entered upon a piece of smooth plank, and on the same day transcribed and entered upon his general books of account. *Held*, that the books were a part of the transaction of the delivery and measurement of the logs, and were admissible in evidence to show the number of feet of sound timber.

Place v. Baugher, 232.

2. *Sufficiency.*—*Street Railroads.*—In an action against the Citizens Street Railroad Company for damages for personal injuries alleged to have been sustained by plaintiff while a passenger on defendant's car on Senate avenue in the city of Indianapolis, there was no evidence that defendant owned or operated a street railroad on Senate avenue, or that plaintiff was a passenger upon one of its cars. Defendant introduced in evidence a map showing the tracks of a street railroad on Senate avenue marked "Citizens St. R. R." and a witness for defendant testified that he was employed by the Street Railroad Company of Indianapolis as a motorman, and at the time of the accident was running a car on Senate avenue. *Held*, that the evidence was insufficient to support a verdict for plaintiff. Hadley, J., dissents.

Citizens St. R. Co. v. Stockdell, 25.

EXECUTORS AND ADMINISTRATORS—

1. *Special Administrator.*—*Action Against Surviving Partner.*—*Costs.*—A special administrator appointed under §2393 Burns 1901 has authority to bring an action for an accounting against a surviving partner, and if the suit is in good faith he is not personally liable for costs.

Bruning v. Golden, 199.

2. *Special Administrator.*—*Suit for Benefit of Estate.*—*Costs.*—B died testate, making his two children, a son and a daughter, beneficiaries. Prior to testator's death he and his son were partners in business. A special administrator appointed by the court after the probate of the will brought suit against the son for an accounting of the partnership business. *Held*, that the suit was for the benefit of the estate, and not for the daughter, and that the special administrator was not liable individually for costs.

Bruning v. Golden, 199.

3. *Costs of Litigation.*—Where an administrator exercises reasonable care and in good faith prosecutes and defends cases in the interest of the estate he is entitled to have costs and reasonable expenses allowed as credits in his settlement.

Bruning v. Golden, 199.

4. *Costs.*—*Judgment.*—*Collateral Attack.*—A judgment for costs against an administrator in his fiduciary capacity is not subject to collateral attack.

Bruning v. Golden, 199.

5. *Widow's Absolute Allowance.*—*Complaint.*—*Will as Exhibit.*—The will of a husband devised to his widow such part of his estate as she might be entitled to under the statutes of descent in force at the time of his death. *Held*, in an action against the administrator with the will annexed, that it was not necessary that a copy of the will be filed with the complaint, since the action was under the statute, and not founded on the will.

Brown v. Bernhamer, 538.

6. *Widow's Allowance.*—*Assignment.*—*Demand.*—A demand made by a widow on the administrator of her husband's estate inures to the benefit of her assignee.

Brown v. Bernhamer, 538.

EXECUTORS AND ADMINISTRATORS—Continued.

7. *Widow's Allowance.—Action to Recover.—Interest.*—Where an administrator upon demand refuses to pay the widow her statutory allowance of \$500, and she sues for the same, she is entitled to recover from the estate, in addition to her allowance, the interest thereon from the date of the administrator's refusal to pay.
Brown v. Bernhamer, 538.

EXEMPLARY DAMAGES—For false imprisonment, see **FALSE IMPRISONMENT**, 6; *Harness v. Steele, 286.*

EXEMPTION—Of rents during year of redemption from mortgage foreclosure sale, see **MORTGAGES**, 4; *Russell v. Bruce, 553.*

EXHIBIT—Will of testator as exhibit, see **EXECUTORS AND ADMINISTRATORS**, 5; *Brown v. Bernhamer, 538.*

Assignment of lease as exhibit in action for breach, see **LANDLORD AND TENANT**, 4; *Indiana Nat. Gas, etc., Co. v. Hinton, 398.*

EXPLOSION—Liability of landlord for explosion of gas caused by defective pipes, see **LANDLORD AND TENANT**, 8; *Indianapolis Abattoir Co. v. Temperly, 651.*

- FALSE IMPRISONMENT—

1. *Complaint.*—A complaint in an action for false imprisonment setting forth that "defendant unlawfully imprisoned the plaintiff and deprived him of his liberty for the space of one hour," etc., is not demurrable on the ground that it pleads a conclusion.
Harness v. Steele, 286.
2. *Complaint.*—A complaint for false imprisonment is sufficient without alleging that the act complained of was illegal or wrongful, or that the arrest or imprisonment was without competent authority, or malicious, or without probable cause.
Harness v. Steele, 286.
3. *Arrest Without Warrant.—Unlawful Detention.—Liability of Officer.*—Where a person arrested without a warrant is held by an officer for a longer period of time than is required, under the circumstances, without such warrant, he will have a cause of action for false imprisonment against the officer and all others by whom he has been unlawfully detained.
Harness v. Steele, 286.
4. *Unlawful Detention of Accused by Officer.*—An officer arresting without a warrant can not justify his action in detaining a prisoner for an unreasonable time before obtaining a warrant, upon the ground that such delay was necessary in order to investigate the case and procure evidence against the accused.
Harness v. Steele, 286.
5. *Damages.*—Wounded pride, humiliation, and mortification resulting from a public arrest are proper elements to be taken into consideration in assessing damages in an action for false imprisonment.
Harness v. Steele, 286.
6. *Exemplary Damages.—Malice.*—Where in an action for false imprisonment the evidence discloses that the plaintiff was a boy fourteen years old, and was accused by defendant in the presence of others of being a thief, and upon denial plaintiff was called a liar, the jury may assess exemplary damages, although no malice on the part of the defendant is shown.
Harness v. Steele, 286.

FELLOW SERVANT—See **MASTER AND SERVANT**.

FENCES—Additional fences as element of damages in location of highway, see **HIGHWAYS**, 1; *Fifer v. Ritter*, 8.

FOREIGN JUDGMENT—See **JUDGMENT**.

FORFEITURE—Of recognizance, see **JUDGMENT**, 10; *State v. Hindman*, 586.

FRAUDS, STATUTE OF—

Parol promise to pay for goods furnished another, see **ASSUMPSIT**, 2; *Cox v. Pelletier*, 355.

Contract Signed by One Party.—The signatures of the owners of real estate to a proper memorandum of a contract of sale is sufficient to take the contract out of the statute of frauds as to them, although the contract is not signed by the other parties thereto.

Burke v. Mead, 252.

FRAUDULENT CONVEYANCE—

Complaint.—A complaint to set aside a deed as fraudulent which contains no averment as to the financial condition of defendant at the time of the commencement of the action, except that he had no property subject to execution "of which plaintiff has any knowledge," is insufficient.

Davis v. Chase, 242.

GAS—Lease for, see **LANDLORD AND TENANT**, 4, 5, 6, 7; *Indiana Nat. Gas, etc., Co. v. Hinton*, 398.

GOOD-WILL—Taxation of good-will of newspaper, see **TAXATION**, 2-8; *Hart v. Smith*, 182.

GRAND JURY—Contempt of court for failure to return indictment, see **CONTEMPT**; *State v. Rockwood*, 94.

GRAVEL ROADS—See **HIGHWAYS**.

HABEAS CORPUS—

Criminal Law.—Habeas corpus will not lie for the release of a prisoner remanded to the custody of the sheriff by a justice of the peace, upon waiver of a preliminary hearing, under an affidavit containing a colorable criminal charge, on the ground that no public offense was charged; since the remedy was by appeal.

Cruithers v. Bray, 685.

HIGHWAYS—Vacating order establishing highway, see **COUNTY COMMISSIONERS**, 1; *Robson v. Richey*, 660.

Local laws for improvement of highways, see **CONSTITUTIONAL LAW**, 5, 6; *Board, etc., v. Spangler*, 575.

Easement for private road, see **EASEMENTS**; *Dudgeon v. Bronson*, 562.

Review on appeal of motion to reject viewers' report, see **APPEAL AND ERROR**, 84, 85; *Fifer v. Ritter*, 8.

Extension over railroad right of way, see **RAILROADS**, 7; *Baltimore, etc., R. Co. v. State, ex rel.*, 510.

Duty of railroad to maintain highway crossings, see **RAILROADS**, 6; *Baltimore, etc., R. Co. v. State, ex rel.*, 510.

HIGHWAYS—Continued.

1. *Opening.—Damages.—Additional Fences.*—When property is taken for the location of a public highway, the owner is entitled to just compensation, including pay for inconveniences imposed, and for additional fences, but such compensation need not be in money or property, but may be in benefits conferred. *Fifer v. Ritter, 8.*
2. *Location.—Damages.—Evidence.*—Where a landowner seeks damages for the location of a highway located so as to cut off a strip of his land, evidence that the value of such strip consisted solely in the timber which grew upon it is admissible. *Fifer v. Ritter, 8.*
3. *Opening Highway.—Damages.—Instruction.*—On the trial of a remonstrance for damages in a proceeding for the opening of a highway, an instruction that it was proper to consider as a benefit any increase to the value of plaintiff's land although like benefits accrued to all other lands affected in the community, and if the benefits resulting from the highway were all bestowed upon lands in the neighborhood other than plaintiff's and did not make the plaintiff's land more valuable, they would have no right to consider them, though open to criticism for looseness of language, did not tend to mislead the jury into thinking that it was proper to charge plaintiff any benefit that did not attach to his land. *Fifer v. Ritter, 8.*
4. On the trial of a remonstrance for damages in a proceeding for opening a highway, an instruction that "If you find in the process of time that the proposed road will reasonably bring added benefits to this land, you may consider how much at this time the benefit would be to this land by establishing this road" is not erroneous as authorizing the jury to charge against plaintiff any future benefits that may come to the land by reason of the improvement. *Fifer v. Ritter, 8.*
5. *Gravel Road Bonds.—Injunction.—Collateral Attack.*—A suit will lie to enjoin the issuing of gravel road bonds and the levying and collecting of a tax for the payment thereof, where such issue of bonds, including bonds already issued, exceeds four *per centum* of the assessed taxable valuation of the property of the township in violation of the act of 1899 (Acts 1899, p. 26).
Board, etc., v. Spangler, 575.

HUSBAND AND WIFE—Desertion of wife, see CRIMINAL LAW, 9; *State v. Langdon, 377.*

Wife is bound to take notice of terms of exchange of real estate, where she is a party to the transaction, though the agreement was made with her husband, see **VENDOR AND PURCHASER, 2; *Scott v. Edgar, 38.***

1. *Married Women.—Suretyship.—Bills and Notes.*—Whether a married woman is a surety or a principal on a note is to be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received, in person or in estate, the benefit of the consideration upon which the contract rests. *Cook v. Buhrlage, 162.*
2. Where the sole consideration of a note executed by a married woman and another was property conveyed, the title to which did not vest in the former, she was only a surety on the note, and the same was void as to her. *Cook v. Buhrlage, 162.*
3. A wife joined with her husband in the execution of a mortgage upon the husband's real estate to secure certain notes given for the balance of purchase money thereof. Thereafter the husband and wife executed a note and the proceeds thereof were applied

HUSBAND AND WIFE—Continued.

to the payment of one of the purchase money notes so secured. *Held*, in an action on the latter note, that the wife was surety.

Andrysiak v. Salkoski, 428.

4. *Suretyship of Wife.—Inchoate Interest of Wife.*—The fact that a wife had an inchoate interest in the real estate does not make her principal on a note given by her and her husband, the proceeds of which were applied to the payment of her husband's note secured by a mortgage on the real estate.

Andrysiak v. Salkoski, 428.

INDICTMENT—Description of offense, see **MURDER**, 1; *Freese v. State*, 597.

Joinder of offenses in indictment, see **CRIMINAL LAW**, 10; *State v. Balsley*, 395.

When charging the offense in the language of the statute is not sufficient, see **CRIMINAL LAW**, 8, 4; *Johns v. State*, 413.

For practicing medicine without license, see **CRIMINAL LAW**, 1, 2; *Parks v. State*, 211.

For unlawful use of labeled bottles, see **CRIMINAL LAW**, 5-8; *State v. Wright*, 422; *State v. Wright*, 394; *State v. Barnett*, 432.

INFERENCES—In pleading, see **PLEADING**, 2; *McElwaine-Richards Co. v. Wall*, 557.

INJUNCTION—By taxpayer to prevent levying of illegal tax, see **PARTIES**; *Board, etc., v. Spangler*, 575.

To prevent the issuing of gravel road bonds, see **HIGHWAYS**, 5; *Board, etc., v. Spangler*, 575.

State board of tax commissioners may be enjoined when acting without jurisdiction, see **TAXATION**, 6; *Hart v. Smith*, 182.

No Adequate Remedy at Law.—Taxation.—Gravel Roads.—An order of the board of commissioners levying a special tax for the payment of bonds for the construction of gravel roads is an administrative act, from which no appeal will lie, and an aggrieved taxpayer, having no adequate remedy at law, is entitled to the remedy of injunction.

Board, etc., v. Spangler, 575.

INSANE PERSON—Defense in prosecution for murder, see **MURDER**, 2; *Freese v. State*, 597.

INSOLVENCY—See **RECEIVERS**.

Corporation may prefer creditors for whose claims its directors are surety, see **CORPORATIONS**, 3; *Nappanee Canning Co. v. Reid, Murdoch & Co.*, 614.

INSTRUCTIONS—Incomplete instruction, see **TRIAL**, 7, 8; *Johnson v. Gebbauer*, 271; *Harness v. Steele*, 286.

Irrelevant to facts found, see **TRIAL**, 9, 10; *Indianapolis St. R. Co. v. Hockett*, 677.

A general instruction will not cure error in giving a specific instruction, see **TRIAL**, 6; *Clark v. State*, 60.

INSTRUCTIONS—Continued.

As to reasonable doubt, see **CRIMINAL LAW**, 12; *Clark v. State*, 60.
 Exceptions to, see **APPEAL AND ERROR**, 18; *Malott v. Hawkins*, 127.
 Incorporation in record, see **APPEAL AND ERROR**, 14, 15; *Andrysiak v. Salkoski*, 428.

INSURANCE—

1. *Payment of Premium.—Forfeiture.—Complaint.*—Where a life insurance policy provided that failure to pay the premium on a certain day should work a forfeiture of the policy, an allegation in the complaint, in an action on the policy, that the policy was not delivered, and did not take effect, until five days after its date, is not sufficient to show a change in the contract as to time of payment of premiums and avoid a forfeiture of the policy for failure to pay the premium at the time stipulated therein.
Tibbitts v. Mutual, etc., Ins. Co., 671.
2. *Assignment of Policy.—Insurable Interest.*—The fact that a person who has in good faith procured a policy of insurance upon his own life in favor of his estate assigns it to another, who has no insurable interest in his life, will not prevent a recovery by the latter upon the maturity of the policy. *Davis v. Brown*, 644.
3. *Assignment of Policy.—Complaint by Assignee.—Pleading.*—A complaint by the assignee of a life insurance policy need not anticipate and negative the defense that the assignment was a part of a transaction that contravenes public policy.
Davis v. Brown, 644.
4. *Assignment of Policy.*—The provision of §4914h Burns 1901 that the assignment of an insurance policy to one having no insurable interest in the life of the insured, except as security for a debt, with remainder over to the beneficiary or to the estate of the insured, shall render such policy void, does not apply to foreign companies.
Davis v. Brown, 644.

INTEREST—Recovery of, see **EXECUTORS AND ADMINISTRATORS**, 7; *Brown v. Bernhamer*, 538.

INTERROGATORIES—Construction, see **TRIAL**, 15-17; *Indianapolis Abattoir Co. v. Temperly*, 651; *Johnson v. Gebhauer*, 271.

INTOXICATING LIQUORS—

1. *Remonstrance.—Power of Attorney.*—A remonstrance by power of attorney against the granting of a license to sell intoxicating liquors is not invalid because the power of attorney does not contain the name of any applicant, but is general and directed against all applicants for license.
Ragle v. Mattox, 584.
2. *Remonstrance.—Grounds of Need Not be Stated.*—A remonstrance against the granting of a license to sell liquors, under section nine of the act of March 11, 1895 (Acts 1895, p. 251), need not state the grounds on which the remonstrators rely to defeat the application.
Boomershine v. Uline, 500.
3. *Remonstrance.—Constitutionality of Statute.—Class Legislation.*—Section nine of the act of March 11, 1895, providing the manner in which the legal voters of a township or city ward may successfully remonstrate against the granting of licenses to sell intoxicating liquors, is not unconstitutional as being class legislation; since all applicants for license are subject to the same conditions, and are granted or refused license upon the same terms.
Boomershine v. Uline, 500.

JUDGMENT—Cost judgment not subject to collateral attack, see
EXECUTORS AND ADMINISTRATORS, 4; *Bruning v. Golden*, 199.

1. *Review.—Complaint.*—In a suit to review a judgment rendered against plaintiffs in an injunction proceeding, a complaint which states none of the facts upon which the complaint for injunction rested, nor any fact from which the court deduced its conclusions of law, and refused a new trial, is not sufficient on demurrer.
Hague v. First Nat. Bank, 636.
2. *Res Judicata.—Defective Complaint.—Corporations.—Railroads.*—Where by the provisions of a statute authorizing the creation of a corporation with power to construct a railroad, it was provided as a condition precedent to any duty on the part of the corporation to pay or account to the State for money received that certain collateral things were to be done, such as building the road, earning money, paying expenses, making repairs and improvements, restoring the sums contributed for construction and equipment, reserving a sufficient sum to meet future contingencies and providing a fifteen per cent. current dividend, no duty was imposed upon the corporation to make an accounting to the State until requested by the proper authorities, and a judgment in favor of the corporation upon a complaint by the State for an accounting, in which no demand was alleged, does not constitute an adjudication of a proper suit by the State for an accounting.
Terre Haute, etc., R. Co. v. State, ex rel., 438.
3. A judgment for defendant, on demurrer to the complaint, by reason of the omission of an essential allegation therein, will not bar a subsequent suit upon a complaint in which the omitted allegation is supplied. *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.
4. *Res Judicata.—Action Prematurely Brought.*—A judgment against a plaintiff because his action is prematurely brought will not bar a suit subsequently brought after the cause of action has properly accrued.
Terre Haute, etc., R. Co. v. State, ex rel., 438.
5. *Res Judicata.—Form of Complaint.—Evidence.*—Where judgment was rendered for defendant on demurrer to a complaint on the ground that the complaint failed to state a cause of action, no error was committed in refusing to admit in evidence, in a subsequent action involving the same subject-matter, the written opinion of the judges who sat in the former case to show that the judgment was in fact upon the merits, and not upon the form of the complaint.
Terre Haute, etc., R. Co. v. State, ex rel., 438.
6. *Res Judicata.—Evidence.*—No error was committed in the trial of an action by the State against a railroad company for an accounting in refusing to admit in evidence an agreement between the company and the State to submit the question of the company's liability in the former action as tending to show a former adjudication; since the agreement was to submit the State's claim upon the facts as they existed at that time, not as it was after more profits had been received and a cause of action accrued.
Terre Haute, etc., R. Co. v. State, ex rel., 438.
7. *Foreign Judgment.—Collateral Attack.*—Judgments of the courts of any state having jurisdiction over the subject-matter and of the parties are conclusive on the merits in the other states of the Union until reversed on appeal, or set aside and vacated in a proper proceeding by the court which rendered the judgment, and are not, therefore, open to collateral attack.
American Mut. Life Ins. Co. v. Mason, 15.
8. *Foreign Judgment.—Transcript.—Presumption.*—Where from the transcript of a foreign judgment, it appears that the court

JUDGMENT—Continued.

where the judgment was rendered had a judge, clerk, and seal, the presumption is that the court was one of general jurisdiction, and that it had jurisdiction of the subject-matter of the action and the parties thereto. *American Mut. Life Ins. Co. v. Mason*, 15.

9. *Action Upon Foreign Judgment.—Evidence.—Transcript.*—A transcript which shows that a special appearance was first entered and a motion made "to quash the service and dismiss the action," which was overruled and exceptions taken, that an answer was then filed, the cause tried upon its merits, and a final judgment entered, sufficiently shows that a judge was present at the trial. *American Mut. Life Ins. Co. v. Mason*, 15.

10. *Collateral Attack.—Recognizance.—Forfeiture.*—An answer to a complaint in an action upon a recognizance taken by a justice of the peace alleging that defendant was not called at any term of the court, and that no forfeiture of his recognizance was taken, but that after the final adjournment of the court, said court was irregularly convened in the night-time, and that defendant was then called and a forfeiture was taken, constituted a collateral attack upon the action of the court, and was bad against a demurrer, where it did not appear from the complaint or answer that there was anything in the record indicating that the forfeiture was not regularly taken at the proper time.

State v. Hindman, 586.

11. *Collateral Attack.*—A cross-complaint in an action on a forfeited recognizance alleging that the judicial proceeding upon which the principal action was in part founded was void for fraud, because in fact taken in vacation, although purporting to have been taken in term, is a direct and not a collateral attack upon the proceedings of the court. *Harman v. Moore*, 112 Ind. 221 and *Cully v. Shirk*, 131 Ind. 76, disapproved.

State v. Hindman, 586.

12. *Impeachment.—Former Judge as Witness.—Competency.*—In an action on a forfeited recognizance bond, a former judge of the court, who directed the forfeiture to be entered, was a competent witness to establish the fact that the forfeiture was taken after the final adjournment of the court.

State v. Hindman, 586.

13. *Mechanic's Lien.—Mortgages.—Equity of Redemption.*—A personal judgment obtained by the holders of a mechanic's lien against the owners of the property, in a suit to foreclose the lien, created a lien on the owners' equity of redemption from a mortgage foreclosure sale of the property; and where the holders of the mechanic's lien were not made parties to the suit to foreclose the mortgage, such judgment lien was not cut off or barred by the decree rendered therein.

Martin v. Berry, 566.

JURISDICTION—Of court to appoint receiver for railroad, see **COURTS**, 1; *Chicago, etc., R. Co. v. Kenney*, 72.

JURY—Recall of, pending deliberation, see **TRIAL**, 23, 24; *Cox v. Peltier*, 355.

LABOR—See **WORK AND LABOR**.

LACHES—Of officers, see **LIMITATION OF ACTIONS**, 2; *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.

LANDLORD AND TENANT—

1. *Lease.—Water Privilege.—Assignment.*—In a lease granting the privilege to draw water from a canal, a covenant to pay rent runs with the land, and an assignee of the lease is liable for the rent.
Jordan v. Indianapolis Water Co., 337.
2. For a certain yearly rental a water company contracted with B to furnish water during certain months in the year, and when not needed for certain hydraulic purposes. B was to provide a trunk in the bank of the canal, with a stop-gate. The company did not agree to keep the canal in repair. It was further provided that B should not be liable for rent if the pond created by the water taken should be declared a nuisance, if any intervening owner interfered with the maintenance of the trunk across his land, or if the water company was unable to furnish water. *Held*, that the contract was not a license, a mere unenforceable option to draw water, but a lease founded on good consideration, and that B was liable for rent if through her own fault she failed to take water.
Jordan v. Indianapolis Water Co., 337.
3. *Assignment of Lease.—Lessee's Liability for Rent.*—A lessor's consent to an assignment of a lease by the lessee does not relieve the lessee from an express covenant to pay rent.
Jordan v. Indianapolis Water Co., 337.
4. *Gas and Oil Lease.—Assignment.—Breach of Covenant.—Complaint.—Exhibit.*—In an action against the assignee of a gas and oil lease for a breach of covenant, a copy of the assignment need not be filed with the complaint, since the action is not founded on the assignment but on the lease.
Indiana Nat. Gas, etc., Co. v. Hinton, 398.
5. *Covenants Running With the Land.—Breach.*—Covenants of a gas and oil lease to pay rent and to furnish the lessor with gas to heat and light his dwellings on the premises, are covenants running with the land; and in an action against an assignee of the lease, an allegation that such assignee agreed to perform the covenants is not required.
Indiana Nat. Gas, etc., Co. v. Hinton, 398.
6. *Gas and Oil Lease.—Construction.*—A gas and oil lease executed on the 25th of July, 1889, provided in its first article that the lessees should drill a well within twelve months, or, failing to do so, pay lessor \$56 yearly as rent. The ninth article of the lease stipulated that lessees would furnish gas to heat and light the dwellings on the premises demised on or before November 15th. *Held*, that while the two provisions in the lease were somewhat inconsistent they were both lawful, and the failure to drill a well upon the premises within a specified time did not excuse lessee from performance of covenant to furnish gas for dwelling.
Indiana Nat. Gas, etc., Co. v. Hinton, 398.
7. *Breach of Covenant.—Who May Maintain Action.*—The owner and occupant of lands leased for gas and oil purposes may maintain an action for a breach of a covenant in the lease to furnish gas for use on the premises, notwithstanding that such owner had conveyed the land to others to secure a debt.
Indiana Nat. Gas, etc., Co. v. Hinton, 398.
8. *Natural Gas Explosion.—Liability of Landlord.—Negligence.*—Where a landlord occupied a portion of a building, and piped it for natural gas for its own benefit solely, and not for the use of the tenant, it was bound to use ordinary care to prevent the escape of gas therefrom; and where such pipes were defective and leaking, and known by the landlord to be in such defective condition,

LANDLORD AND TENANT—Continued.

the landlord is liable for injury to a tenant, who was without fault, for an explosion resulting from such leakage.

Indianapolis Abattoir Co. v. Temperly, 651.

9. *Natural Gas Explosion.—Notice.*—Where a cold storage company rented a room in which it had gas-pipes placed for its own use in another part of the building, and had notice that gas was escaping therefrom, its duty to repair the leaks or turn off the gas did not depend upon its superior knowledge or means of knowledge as to the condition of things in the tenant's room.

Indianapolis Abattoir Co. v. Temperly, 651.

10. *Natural Gas Explosion.—Assumption of Risk.—Pleading.*—In an action by a tenant against a landlord for damages from an explosion of natural gas which had escaped from pipes placed in the building by the landlord for his own use and convenience, and not for the benefit of the tenant, the doctrine of assumed risk does not apply, and it is sufficient to allege that the injury occurred without contributory fault on the part of plaintiff.

Indianapolis Abattoir Co. v. Temperly, 651.

11. *Natural Gas Explosion.—Damages.—Pleading.—Negligence.*—An allegation in a complaint in an action by a tenant against the landlord for damages resulting from an explosion of natural gas which escaped from pipes placed in the building for the use of the landlord, that plaintiff without negligence and not knowing that gas had escaped and filled the room, and not knowing the danger of so doing, entered the room in which the gas was confined, was a sufficient averment as to knowledge on the part of plaintiff.

Indianapolis Abattoir Co. v. Temperly, 651.

LICENSES—Of physicians, see **CONSTITUTIONAL LAW**, 7; *Parks v. State, 211.*

Physician practicing without, see **PHYSICIANS**, 1, 2; *Parks v. State, 211.*

Vehicle license, see **MUNICIPAL CORPORATIONS**, 3-9; *City of Terre Haute v. Kersey, 300; Hogan v. City of Indianapolis, 523.*

LIENS—As to vendor's lien, see **VENDOR AND PURCHASER**, 1, 2, 3; *Scott v. Edgar, 38.*

LIFE ESTATE—A deed construed to give, see **DEEDS**, 4; *Adams v. Alexander, 175.*

LIFE INSURANCE—See **INSURANCE**.

LIMITATION OF ACTIONS—Wife desertion, see **CRIMINAL LAW**, 9; *State v. Langdon, 377.*

1. *Charter of Railroad Company a Written Contract.*—A special charter granted by the State authorizing a company to construct a railroad, constituted a written contract, without the written acceptance on the part of the company, where the company acted under the charter, exercised the right of eminent domain, took possession of real estate, constructed a railroad and operated it; and an action thereon is not barred by the six years' statute of limitation (repealed as to the State in 1881).

Terre Haute, etc., R. Co. v. State, ex rel., 438.

LIMITATION OF ACTIONS—Continued.

2. *Officers.—Laches.*—A suit by the State against a railroad company created by the act of 1847 (Local Laws 1847, p. 77) to recover surplus profits, is not barred by laches on the part of the State's officers to recover the same.

Terre Haute, etc., R. Co. v. State, ex rel., 438.

LOCAL LAWS—For improvement of highways, see CONSTITUTIONAL LAW, 5, 6; *Board, etc., v. Spangler, 575.*

MANDAMUS—Complaint making township trustee party defendant, see PLEADING, 4; *Baltimore, etc., R. Co. v. State, ex rel., 510.*

To require county auditor to issue warrant, see COUNTIES; *State, ex rel., v. Perry, 508.*

To compel the construction of a highway crossing, see RAILROADS, 8; *Baltimore, etc., R. Co. v. State, ex rel., 510.*

To compel railroad company to lower grade of roadbed, see RAILROADS, 10; *Chicago, etc., R. Co. v. State, ex rel., 237.*

1. *Argumentative Answer.*—In a mandamus proceeding, it is not error to overrule a demurrer to an argumentative answer or return if it alleges facts in bar of the action. *State, ex rel., v. Perry, 508.*

2. *Petition.—Affidavit.—Township Trustee.*—The affidavit in verification of a petition by a township trustee for a writ of mandate is not required to be made by the relator in his official capacity. *Baltimore, etc., R. Co. v. State, ex rel., 510.*

3. *Petition.—Railroads.—Highway Crossing.*—A petition in mandamus to require a railroad company to construct a highway crossing is not defective in failing to specify the character of the notice given in the highway proceeding, where it is alleged that due and legal notice was given as required by statute.

Baltimore, etc., R. Co. v. State, ex rel., 510.

MARRIED WOMEN—See HUSBAND AND WIFE.

MASTER AND SERVANT—

1. *Fellow Servant.*—A section foreman in transporting section-hands to and from work on a hand-car is a fellow servant with the section-hands. *Thacker v. Chicago, etc., R. Co., 82.*

2. *Negligence.—Complaint.*—A complaint against a railroad company by a section-hand for personal injuries sustained while being transported to work on a hand-car, caused by the sudden stopping of the car in response to a signal given by the section foreman, is insufficient, where no facts showing negligence on the part of the foreman are alleged. *Thacker v. Chicago, etc., R. Co., 82.*

3. *Employers Liability Act.—Fellow Servant.*—A railroad company is not liable under the third subdivision of §7083 Burns 1901, for the injury of an employe resulting from the act of a fellow servant done in response to an instruction given by one delegated with authority of the corporation in that behalf, where the order was a proper one, but negligently performed by the fellow servant. *Thacker v. Chicago, etc., R. Co., 82.*

4. *Employers Liability Act.*—A complaint against a railroad company by an employe for personal injuries sustained in being thrown from a hand-car which avers that the section foreman negligently ordered the brakemen to stop the car when the same

MASTER AND SERVANT—Continued.

was going at a speed of twenty miles an hour, without giving plaintiff notice, and that the brakemen complied with the order, and stopped the car suddenly, as it was their duty to do, and plaintiff was thereby thrown from the car and injured, states a cause of action within the meaning of the second subdivision of §7083 Burns 1901.

Thacker v. Chicago, etc., R. Co., 82.

5. *Employers Liability Act.—Common Law Liability.—Railroads.*—The provision of subdivision four of §7083 Burns 1901 making railroad companies or other corporations, except municipal, liable for damages for personal injuries to employes caused by the negligence of a fellow servant, the fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the power to direct, is the mere enactment of a liability which already existed at common law, and limits the common law right of recovery to persons injured while obeying or conforming to the order of some superior at the time of the injury having power to direct.

Thacker v. Chicago, etc., R. Co., 82.

6. *Assumption of Risk.—Violation of Statutory Duty.*—The doctrine of assumption of risk does not apply to a case where the injury occurs by reason of the negligent non-observance by the master of a positive and fixed duty enjoined by statute.

Island Coal Co. v. Swaggerty, 664.

7. *Carpenter.—Safe Working Place.—Contributory Negligence.*—Plaintiff, being a man of mature years, weighing 160 pounds, of extended experience as a house builder, and with good eyesight, went upon an unfinished building, and without direction or advice of his employer walked upon two by six unbridged joists, fourteen feet long, which he knew were designed only to support the laths and plaster forming the ceiling of the chamber below. A defect in one of the joists caused it to break, precipitating plaintiff to the floor below. *Held*, that plaintiff was guilty of contributory negligence, and could not recover for injuries sustained.

Baxter v. Lusher, 381.

8. *Unsafe Working Place.—Complaint.—Inferences.*—In an action against an employer for personal injuries caused by the turning of a plate or chord in a partially constructed building on which plaintiff was working, the complaint must allege directly, and not by way of inference, the negligent construction of the plate.

McElwaine-Richards Co. v. Wall, 557.

9. *Safe Appliances.—Instruction.*—An instruction that "if an employe sustains injury in consequence of the failure or neglect of an employer to use reasonable care and diligence" to discharge the duty of providing safe machinery, then the employe, if injured without his fault, etc., would be entitled to recover, sufficiently charges that only reasonable care is required of an employer in providing safe machinery.

Johnson v. Gebhauer, 271.

10. *Personal Injury.—Failure to Guard Dangerous Machinery.—Knowledge by Employe.—Volenti non fit Injuria.*—A complaint for a personal injury to an employe while operating a circular saw, resulting from the failure of the employer to guard the same, as required by §7087i Burns 1901, is sufficient without an averment that the plaintiff had no knowledge of the unguarded condition of the saw and the dangers resulting therefrom.

Monteith v. Kokomo, etc., Co., 149.

MASTER AND SERVANT—Continued.

11. *Fellow Servant.—Mines.*—A mine owner is not relieved under the fellow servant rule from liability for an injury sustained by a mine employe because of the failure of the mine boss, who represented the owner in the mine, to stop the elevator in its descent by pulling the cord attached to the whistle valve.

Island Coal Co. v. Swaggerty, 664.

12. *Personal Injuries.—Evidence.*—In an action by a servant for personal injuries from a defective machine, evidence as to the condition of the machine based upon an examination of the machine, made a week after the accident, was properly admitted, where it was shown that the machine was then in the same condition as at the time of the accident.

Creamery, etc., Co. v. Hotsenpiller, 99.

13. *Corporation.—Penalty for Violation of Monthly Payment Wage Law.—Special Finding.*—In an action against a corporation to recover penalty for failure to make monthly settlements with employes, a special finding that "there was no contract of employment between any of the employes and the defendant" is not equivalent to a finding of facts showing that there was no written contract between the corporation and said employes as to the time of payment of wages.

Chicago, etc., R. Co. v. Glover, 166.

14. *Monthly Payment of Wages.—Labor Claim.—Assignment.—Action by Assignee.*—Under §§7056, 7057 Burns 1901, providing that a corporation shall, in the absence of a written contract to the contrary, pay its employes at least once a month, and providing a penalty of \$1 a day for a violation thereof, the penalty can not be recovered upon a demand and action by an assignee of a labor claim.

Chicago, etc., R. Co. v. Glover, 166.

15. *Wages.—Assignment.—Payment by Trade-Check.—Class Legislation.—Title of Act.*—The title of the act of March 11, 1901 (Acts 1901, p. 548), is: "An act concerning the issuance of checks, tickets, tokens, or other devices payable in merchandise, or anything other than lawful money by merchants, in payment for the assignment or transfer of wages of employes in coal mines, and repealing all laws in conflict therewith." The body of the act mentions and includes "any merchant or dealer in goods or merchandise, or any other person," upon the one hand, and "any employe or laborer for wages who labors in and about any coal mine," upon the other. *Held*, that the act must be construed as applying only to merchants and to that class of laborers who work in coal mines, and is therefore unconstitutional as being class legislation.

Dixon v. Poe, 492.

MASTER COMMISSIONER—Referring cause to, see **TRIAL**, 5;
Terre Haute, etc., R. Co. v. State, ex rel., 438.

MAXIMS—*Ejusdem generis*: Of the same kind or nature. *Whicker v. Hushaw, 1.*

Expressio unius, exclusio alterius: The naming of one person is the exclusion of the other. *Whicker v. Hushaw, 1; Hart v. Smith, 182.*

Qui prior est tempore, potior est jure: He who is first in point of time, is the stronger in the law. *Baltimore, etc., R. Co. v. Adams, 688.*

Sic utere tuo ut alienum non laedas: So use your own that another you may not injure. *Parks v. State, 211.*

MAXIMS—Continued.

Volenti non fit injuria: An injury can not be done to a willing person. *Monteith v. Kokomo, etc., Co.*, 149.

Fraud vitiates everything. *State v. Hindman*, 586.

General words shall be restrained unto the fitness of the matter and person. *Whicker v. Hushaw*, 1.

In case of insolvency, equality is equity. *Nappanee Canning Co. v. Reed, Murdoch & Co.*, 622.

He who seeks equity must do equity. *Pittsburgh, etc., R. Co. v. Town of Crothersville*, 330; *Johnson v. Central Trust Co.*, 605.

MECHANIC'S LIEN—Lienor's personal judgment not prior to mortgage, see **JUDGMENT**, 13; *Martin v. Berry*, 566.

Foreclosure.—Mortgages.—Mortgagees who were not made parties to a suit to foreclose a mechanic's lien on the mortgaged premises may, after the expiration of the time given by §7259 Burns 1901, for the enforcement of mechanic's liens, enjoin a sale of the property under the decree foreclosing the lien.

Martin v. Berry, 566.

MORTGAGES—Rights of mortgagee as against holder of mechanics' lien, see **MECHANIC'S LIEN**; *Martin v. Berry*, 566.

1. *Foreclosure.—Rents During Year of Redemption.—Receivers.*—The court rendering a decree of foreclosure is authorized by subdivision 4, §1236 Burns 1901, after the sale of the mortgaged property for less than the amount of the judgment, to appoint a receiver to collect and keep, for the further order of the court, the rents accruing during the year allowed for redemption, as against the owner of the property sold.

Russell v. Bruce, 553.

2. *Foreclosure.—Rents During Year of Redemption.—Receivers.*—A mortgagee who purchases the mortgaged property at foreclosure sale for less than the amount of his judgment is entitled to the rents accruing during the year of redemption, as against the owner, for application to the unpaid balance of his judgment.

Russell v. Bruce, 553.

3. *Foreclosure.—Rents During Year of Redemption.*—The fact that a mortgagee who purchased the property at a foreclosure sale for less than the amount of his judgment did not obtain a personal judgment against the owner of the land who had purchased it from the mortgagor, did not affect the right of the mortgagee to the rents of the land during the redemption period.

Russell v. Bruce, 553.

4. *Foreclosure.—Rents During Year of Redemption.—Exemption.*—Where a mortgage is foreclosed and the property sold to the mortgagee for less than the judgment, the owner of the property who purchased it from the mortgagor, and against whom no personal judgment was rendered, can not, as against the mortgagee, under the householder's exemption statute, claim the rents during the year of redemption.

Russell v. Bruce, 553.

5. *Assumption by Vendee.—Executory Contract.*—The fact that the assumption of a mortgage indebtedness is an executory contract will not prevent the person holding the mortgage from availing himself of it while it yet remains the agreement of the vendor and vendee.

Whicker v. Hushaw, 1.

MORTGAGES—Continued.

6. *Assumption by Vendee.—Executory Contract.*—In an action by a mortgagee to enforce a mortgage against a vendee who assumed the payment of the mortgage in an executory contract with the vendor, the burden is on the vendee to show that the deed executed by the vendor contained contractual recitals which changed the rights of the parties to the contract. *Whicker v. Hushaw, 1.*
7. *Assumption by Vendee.—Executory Contract.—Expressio Unius, Exclusio Alterius.—Ejusdem Generis.*—An executory contract for the sale of real estate provided that the vendor should sell and convey the real estate described to vendee "by good and sufficient warranty deed," the vendee to pay a certain amount in cash, upon the delivery of the deed, and assume "all unpaid taxes and mortgages shown of record, and all other liens on said lands, including the attachment proceeding now pending." The contract was consummated on the part of vendor by the execution of the deed. At the time of making the contract there was an unrecorded mortgage against the land, made by vendor, of which the vendee had full knowledge. *Held*, that vendee is not personally liable for the debt secured by the mortgage. *Whicker v. Hushaw, 1.*
8. *Foreclosure.—Writ of Assistance.*—A writ of assistance will be awarded to the grantee of the purchaser at a mortgage foreclosure sale. *Emerick v. Miller, 317.*
9. *Proceedings for Writ of Assistance.—Answer.—Fraud.*—In proceedings for a writ of assistance by one claiming possession of real estate under a mortgage foreclosure sale, an answer by the mortgagor that the decree was procured by fraud is insufficient on demurrer; it not being averred in such answer that suit was pending to set aside such decree, or that such suit was contemplated. *Emerick v. Miller, 317.*
10. *Foreclosure.—Possession.—Writ of Assistance.*—The circuit court, sitting as a court of equity, has the power to issue the summary writ of assistance to put the purchaser at a mortgage foreclosure sale in possession. *Emerick v. Miller, 317.*
11. *Release.—Penalty.—Corporations.*—Section 1105 Burns 1894, prescribing a penalty for failure of any "person" to release a mortgage of record after the same has been paid does not apply to corporations. *Studebaker Bros. Mfg. Co. v. Morden, 173.*
12. *To Secure Permanent Endowment Funds of University.—Sale.*—Where there is default in the payment of a mortgage to secure permanent endowment funds of the State University, the Auditor of State is not required to foreclose the mortgage, but may sell the mortgaged land by public advertisement without suit. *Fisher v. Brower, 139.*
13. *Sale to Collect Endowment Funds.—Junior Mortgagor no Right to Redeem.*—Where a sale of land has been made by the State Auditor to collect a mortgage loan of State University endowment funds, a junior mortgagor has no right to redeem. *McElwaine-Richards Co. v. Gifford, 534.*
14. *Mortgage to Secure University Endowment Fund.—Sale by State Auditor.—Junior Mortgage.—Priority.*—A purchaser of land at a sale by the State Auditor to collect the amount of a loan represented by a State University endowment-fund mortgage, takes the land free from the lien of junior mortgage. *McElwaine-Richards Co. v. Gifford, 534.*
15. *Sale by State Auditor.—Constitutional Law.*—The act of the legislature authorizing the State Auditor to collect the amount of a

MORTGAGES—Continued.

loan represented by a State University endowment-fund mortgage is not unconstitutional as conferring judicial power on the State Auditor. *McElwaine-Richards Co. v. Gifford*, 534.

MOTIONS—Overruling motion to strike out not reversible error, see **APPEAL AND ERROR**, 80; *Chicago, etc., R. Co. v. Woodard*, 541.

MUNICIPAL CORPORATIONS—Office of school trustee not vacated by incorporation of town as city, see **SCHOOLS**, 1; *State, ex rel., v. Ogan*, 119.

Title to school property in newly incorporated city, see **SCHOOLS**, 4; *Maumee School Tp. v. School Town of Shirley City*, 423.

1. *Street Improvements.—Acceptance.—Administrative Act.*—In determining whether a street improvement has been completed according to law, a town board acts in an administrative and not in a judicial capacity. *Town of Greenwood v. State, ex rel.*, 267.
2. *Street Improvements.—Work Not According to Contract.—Power of Town Trustees.*—The board of trustees of a town has the power at any time before the assessment of benefits has been made by such board, under §4294 Burns 1901, against lots and parcels of ground benefited, to set aside and vacate an order requiring the town engineer to make the final estimate and report, on the ground that the improvement was not made according to the contract. *Town of Greenwood v. State, ex rel.*, 267.
- 2½ *Lien for Sidewalk Improvements.—Complaint.*—A contract between a town and contractor for the improvement of a sidewalk is not the foundation of an action to foreclose a statutory lien against abutting property for such improvement, and the failure of the complaint to aver that the contract was in writing is not an omission to state a fact essential to plaintiff's causes of action. *Drew v. Town of Geneva*, 364.
3. *Vehicle License.—Taxation.*—A city governed by the general laws of this State relating to the organization of cities, and conferring upon common councils thereof certain enumerated powers (§§3541, 3541a, 3617, 3623 Burns 1901), has power to impose a tax for a license to use vehicles upon its streets, including private vehicles, for the purpose of creating a revenue for the maintenance and repair of the streets. *City of Terre Haute v. Kersey*, 300.
4. *Vehicle License.—Taxation.*—A city ordinance imposing a tax for the use of streets by vehicles is not a tax on the vehicles as articles of property, but the effect thereof is to subject the owners of the vehicles to the payment of a tax for a license or privilege of using such vehicles upon the public streets of the city. *City of Terre Haute v. Kersey*, 300.
5. *Vehicle License.—Classification.*—An ordinance imposing a tax for a license to use vehicles upon the streets of a city is properly based upon the use to which such vehicles are devoted rather than the value of the vehicles. *City of Terre Haute v. Kersey*, 300.
6. *Vehicle License.—Taxation.—Constitutional Law.*—Section 1, article 10, of the State Constitution, which provides for a uniform and equal rate of assessment and taxation relates to a general assessment of taxes on property according to its value, and does not apply to a tax for a license to use vehicles upon the streets of a city. *City of Terre Haute v. Kersey*, 300.

MUNICIPAL CORPORATIONS—Continued.

7. *Vehicle License.—Taxation.*—The authority of a city to enforce a vehicle license for the purpose of creating revenue for the maintenance and repair of streets must be conferred by statute, and such power must be strictly construed.

City of Terre Haute v. Kersey, 300.

8. *Vehicle License.—Taxation.—Police Power.*—The adoption of an ordinance fixing a license upon vehicles used upon the streets of a city which neither professes nor is intended in any manner to regulate or restrict the use of vehicles, but the primary purpose of which is to impose a license tax as a revenue for the maintenance and repair of the streets, is not the exercise of a police power.

City of Terre Haute v. Kersey, 300.

9. *Vehicle License.—Taxation.—Police Power.—City of Indianapolis.*—The owner and user of a vehicle subject to a license fee imposed by an ordinance enacted pursuant to clauses 12, 36, and 39 of §3106 R. S. 1881, authorizing cities to regulate the use of vehicles, may also be required to pay the tax imposed by an ordinance enacted pursuant to §3794 Burns 1901, authorizing certain cities to impose a vehicle tax; the first being imposed under the police power, and the second under the taxing power of the city.

Hogan v. City of Indianapolis, 523.

10. *Personal Injuries.—Defect in Street.*—A complaint in an action against a city for personal injuries sustained by plaintiff while riding a bicycle because of a defect in an improved street, described as a hole four inches in depth, two feet in width, and three feet long, which alleges that while plaintiff was riding her bicycle she approached said street so out of repair and by reason of said street being out of repair, defective, and unsafe, she was thrown from her bicycle and injured, is insufficient as against a demurrer, where it was not alleged that the wheel came in contact with the defect, or how or in what manner the accident was caused by the defect.

City of Logansport v. Kuhn, 68.

MURDER—

1. *Indictment.*—An indictment for murder charging that defendants on a certain day "at the county and State aforesaid, did then and there feloniously, purposely, and with premeditated malice, kill and murder one William Gray, by then and there feloniously, purposely, and with premeditated malice, shooting at, against, and into, and thereby mortally wounding the said Gray, with a certain deadly weapon, called a revolver, then and there loaded with gunpowder," etc., sufficiently describes the offense charged.

Freese v. State, 597.

2. *Insanity.—Sufficiency of the Evidence.*—A defendant charged with murder pleaded insanity, and introduced testimony tending to prove her mental unsoundness. The State offered in rebuttal no evidence to the contrary. *Held*, that the jury was not bound to acquit the defendant; since they, being the sole judges of the weight of the evidence, might find the same unworthy of belief, and disregard it.

Freese v. State, 597.

NEGLIGENCE—See CARRIERS; CONTRIBUTORY NEGLIGENCE; DAMAGES; MASTER AND SERVANT; RAILROADS; STREET RAILROADS.

Of landlord in maintaining defective gas-pipes, see **LANDLORD AND TENANT**, 8, 9, 10, 11; *Indianapolis Abattoir Co. v. Temperly, 651.*

1. *When Question of Fact.*—Whether a mine boss who stood at the bottom of an elevator shaft at the edge of a pit or sump which

NEGLIGENCE—Continued.

plaintiff was engaged in cleaning out was guilty of negligence in failing to signal the engineer to stop the elevator in its descent was a question of fact for the determination of the jury.

Island Coal Co. v. Swaggerty, 664.

2. *Street Railroads.—Passenger Attempting to Alight While Car is in Motion.*—Whether a passenger is guilty of negligence in attempting to get off a moving street car, not running at a dangerous rate of speed, is a question for the jury, to be determined from the facts, under proper instructions by the court.

Indianapolis St. R. Co. v. Hockett, 677.

NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES.

NEWSPAPERS—Taxation of good-will, see **TAXATION**, 2-8; *Hart v. Smith*, 182.

NEW TRIAL—Former jeopardy, see **CRIMINAL LAW**, 10; *State v. Balsley*, 395.

Causes.—Appeal and Error.—Specifications in a motion for a new trial in a civil action "that the finding and judgment of the court is contrary to the evidence" and "that the finding and judgment of the court is contrary to the law" present no question on appeal, since the statute recognizes no such reasons for a new trial.

Lynch v. Milwaukee Harvester Co., 675.

NOTICE—Pleading and proof of, see **PLEADING**, 1; *Johnson v. Gebauer*, 271.

Publication.—A publication of notice of sale for nine successive weeks in a weekly newspaper, said period of nine weeks terminating two days before the sale, is sufficient compliance with §6109 Burns 1901.

Fisher v. Brower, 139.

NUISANCE—

1. *Abatement.—Injunction.—Complaint.*—On the ground that he who comes into a court of equity must come with clean hands, the plaintiff in a suit to enjoin the abatement of stock-pens as a public nuisance must allege and prove that the stock-pens were not a public nuisance, although the defendants were without authority to abate such nuisance.

Pittsburgh, etc., R. Co. v. Town of Crothersville, 330.

2. *Abatement.—Injunction.—Burden of Proof.*—In a suit by a railroad company to enjoin the abatement of stock-pens as a public nuisance, the burden of proof is on the plaintiff to show that the stock-pens, as maintained, were not a nuisance.

Pittsburgh, etc., R. Co. v. Town of Crothersville, 330.

3. *Similar Nuisances in Same Vicinity.*—One who maintains a public nuisance is not justified or excused because others in the same vicinity maintain similar nuisances.

Pittsburgh, etc., R. Co. v. Town of Crothersville, 330.

OFFICE AND OFFICERS—Liability of sheriff for unlawful detention of prisoner, see **FALSE IMPRISONMENT**, 3, 4; *Harness v. Steele*, 286.

Office of school trustee not vacated by incorporation of town as city, see **SCHOOLS**, 1; *State, ex rel., v. Ogan*, 119.

Laches of officer, see **LIMITATION OF ACTIONS**, 2; *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.

OIL LEASE—See **LANDLORD AND TENANT**, 4, 5, 6, 7; *Indiana Nat. Gas, etc., Co. v. Hinton*, 398.

OVERRULED CASES—*Harmon v. Moore*, 112 Ind. 221 and *Cully v. Shirk*, 131 Ind. 76, see **JUDGMENT**, 11; *State v. Hindman*, 586.

PARTIES—Dismissal of appeal for failure to join adverse parties, see **APPEAL AND ERROR**, 3; *Kreuter v. English Lake Land Co.*, 372.

Third persons made parties by reason of collusion with original plaintiffs, see **PLEADING**, 7; *Davis v. Chase*, 242.

Names of in assignment of errors, see **APPEAL AND ERROR**, 1; *Gunn v. Haworth*, 419.

In term-time appeal, see **APPEAL AND ERROR**, 2; *Gunn v. Haworth*, 419.

Action to Enjoin County Commissioners.—Taxation.—Gravel Roads.—Suit may be maintained by any interested taxpayer to enjoin the issuing of bonds and the levying and collecting of a tax for the payment thereof in violation of the act of 1899 (Acts 1899, p. 26).

Board, etc., v. Spangler, 575.

PARTITION—

1. *Complaint.—Advancement to One of Several Heirs.*—In a proceeding for the partition of real estate among heirs, an averment in the complaint that there had been advancement to one of the defendants his full share of the estate, does not put in issue the title of such heir in the common property. *Sauer v. Schenck*, 373.

2. *Partition Among Heirs.—When Title in Issue.*—In proceedings for the partition of real estate among heirs, no question of title among the partitioners is settled by the decree dividing the property, unless pleadings are specially formed putting the title in issue.

Sauer v. Schenck, 373.

PARTNERSHIP—Action against surviving partner, see **EXECUTORS AND ADMINISTRATORS**, 1; *Bruning v. Golden*, 199.

PAYMENT—By trade-checks, see **MASTER AND SERVANT**, 15; *Dixon v. Poe*, 492.

Of wages monthly, see **MASTER AND SERVANT**, 13, 14; *Chicago, etc., R. Co. v. Glover*, 166.

Of claim to attaching creditor constitutes bar to action by original creditor, see **ATTACHMENT AND GARNISHMENT**, 1; *Baltimore, etc., R. Co. v. Adams*, 688.

PERJURY—

1. *In Answer to Impeaching Question.*—Where a defendant on trial for a crime testified falsely in answer to an impeaching question, he was guilty of perjury, even though the question as asked was one which, under the law, he could not have been compelled to answer. *State v. Cary*, 504.

2. *Information.—Acquittal.*—An information charging defendant with perjury while testifying as a witness in his own behalf on trial for a crime will not be quashed on the ground that defendant's acquittal at such trial showed that the testimony he gave was true. *State v. Cary*, 504.

PERPETUITIES—Item in will providing legacy in violation of statute against perpetuities, see **WILLS**, 3; *Murphy v. Brown*, 106.

PERSONAL INJURIES—At railroad crossings, see **RAILROADS**, 1-5; *Malott v. Hawkins*, 127.

Caused by defect in street, see **MUNICIPAL CORPORATIONS**, 10; *City of Logansport v. Kühn*, 68.

PHYSICIANS—License, see **CONSTITUTIONAL LAW**, 7; *Parks v. State*, 211.

Prosecution for practicing without license, see **CRIMINAL LAW**, 1, 2; *Parks v. State*, 211.

1. *Licenses. — Constitutional Law. — Classification. — Magnetic Healing.*—The law regulating the practice of medicine, §§7318-7323e Burns 1901, is a valid exercise of the police power of the State although it exempts physicians and surgeons legally qualified to practice in the State in which they reside, when in consultation with a legal practitioner of this State; physicians and surgeons residing on the border of a neighboring State, and authorized to practice under the laws thereof, whose practice extends into the limits of this State; opticians; prevents magnetic healers from following their occupations, and permits the granting of licenses to practice osteopathy. *Parks v. State*, 211.
2. *Practicing Without License. — Evidence.*—Evidence that defendant held himself out as a magnetic healer, advertised as such, and styled himself "Professor"; that he was not a graduate of any school of medicine, and had no license; that he treated a patient for a lame ankle which he diagnosed as rheumatism, the treatment consisting in holding the afflicted parts and rubbing them, and received \$1 for the treatment, was sufficient to show defendant guilty of practicing medicine without a license in violation of §§7318-7323e Burns 1901. *Parks v. State*, 211.

PLEADING—Condition precedent, see **CONTRACTS**, 5; *Collins v. Amis*, 593.

Amendment supersedes original pleading, see **APPEAL AND ERROR**, 28; *Hershberger v. Kerr*, 367.

Complaint in action on life insurance policy by assignee, see **INSURANCE**, 3; *Davis v. Brown*, 644.

In mandamus proceeding, see **MANDAMUS**, 1-3; *Baltimore, etc., R. Co. v. State, ex rel.*, 510; *State, ex rel., v. Perry*, 508.

The report of a receiver and exception thereto stand as the complaint and answer of the respective parties, see **RECEIVERS**, 8; *Johnson v. Central Trust Co.*, 605.

1. *Complaint. — Allegation as to Notice. — Proof.*—An allegation of knowledge or notice includes not only actual but constructive notice; and proof either of actual knowledge, or that the defendant by the exercise of ordinary care, might have obtained such knowledge, is admissible under the general allegation of notice. *Johnson v. Gebhauer*, 271.
2. *Sufficiency. — Inferences.*—A court in dealing with evidence may be justified in drawing inferences from certain items of evidence,

PLEADING—Continued.

but where the question involved pertains to the sufficiency of a pleading, inferences will not be resorted to.

McElwaine-Richards Co. v. Wall, 557.

3. *Contract*.—Under a paragraph of complaint counting on a special contract there can be no recovery on an implied contract.

Davis v. Chase, 242.

4. *Mandamus*.—*Township Trustee*.—A complaint in a mandamus proceeding on the relation of the township trustee is not defective because the trustee is described therein as the trustee of the civil township, though the word "civil" might have been omitted without detriment to the complaint.

Baltimore, etc., R. Co. v. State, ex rel., 510.

5. *Personal Injuries*.—*Cities*.—*Defect in Street*.—A complaint against a city for injuries to plaintiff while riding a bicycle on a street, which alleges that the street was dangerous to persons riding bicycles, because of its steep slope or grade from its middle line to the curbing is insufficient against demurrer, where it does not appear that the bicycle slipped or became unmanageable in consequence of the abruptness of the slope, or that the nature of the grade of the street caused or contributed to the accident.

City of Logansport v. Kihm, 68.

6. *New Matter*.—*Supplemental Complaint*.—*Waiver*.—Where an amended complaint is filed which upon its face shows that it contains supplemental matter, the filing of a demurrer or an answer thereto will be held to be a waiver on the part of the defendant of an objection that the new matter set up should have been incorporated in a supplemental complaint.

Jordan v. Indianapolis Water Co., 357.

7. *Cross-Complaint*.—*Collusion*.—*Abatement*.—In a suit by a creditor to set aside a conveyance as fraudulent, the complaint alleged that certain third persons named were made parties to answer to any interest they might have. To a cross-complaint filed by such third persons the principal defendants filed a plea in abatement to the jurisdiction of the court alleging that at the date of the commencement of the cross-action they were residents of another county, and that by collusion between the original plaintiff and the cross-complainants the latter had been made parties to the action for the purpose of enabling them to file the cross-complaint. *Held*, that the averment of "collusion" did not exclude the idea that the cross-complainants were necessary or proper parties to the original action, and that a demurrer to the plea in abatement was properly overruled.

Davis v. Chase, 242.

8. *Argumentative Denial*.—*Harmless Error*.—Sustaining a demurrer to an argumentative denial is harmless error where the general denial was pleaded in another paragraph.

Harness v. Steele, 286.

POLICE POWER—Tax for vehicle license, see **MUNICIPAL CORPORATIONS**, 8, 9; *City of Terre Haute v. Kersey*, 300; *Hogan v. City of Indianapolis*, 523.

Discretion of legislature in enactment of statute, see **CONSTITUTIONAL LAW**, 4; *Parks v. State*, 211.

POWER OF ATTORNEY—To sign remonstrance, see **INTOXICATING LIQUORS**, 1-3; *Ragle v. Mattox*, 584; *Boomershine v. Uline*, 500.

PRECIPE—See **APPEAL AND ERROR**.

PRINCIPAL AND SURETY—See **HUSBAND AND WIFE**.

PRIVATE ROADS—Easement for, see **EASEMENTS**; *Dudgeon v. Bronson*, 562.

PRIZE-FIGHTING—

Information.—*Sufficiency*.—An information alleging that defendant, in pursuance of a previous arrangement and appointment with another, did unlawfully engage as principal in a fight with that other with their fists, for a wager, sufficiently charges the crime of prize-fighting, under §2062 Burns 1901. *State v. Patton*, 248.

PROCESS—

Summons.—*Jurisdiction*.—*Corporations*.—A summons issued and served upon the president and secretary of a corporation in their individual capacity did not give the court jurisdiction of the corporation. *Kirkpatrick, etc., Co. v. Central Electric Co.*, 639.

PUBLICATION—Of notice, see **NOTICE**; *Fisher v. Brower*, 139.

RAILROADS—See **MASTER AND SERVANT**; **STREET RAILROADS**.

Suit to require construction of highway crossing, see **MANDAMUS**, 3; *Baltimore, etc., R. Co. v. State, ex rel.*, 510.

Appointment of receiver, see **CORPORATIONS**, 4; *Chicago, etc., R. Co. v. Kenney*, 72.

Amendment of charter, see **CORPORATIONS**, 5, 6, 7; *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.

Charter a contract, see **LIMITATION OF ACTIONS**, 1; *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.

Charter rights and liabilities of the Vandalia Railroad, see **JUDGMENT**, 2, 3, 4, 5, 6; *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.

1. *Highway Crossings*.—*Contributory Negligence*.—*Instructions*.—The law has marked out with such precision the quantum of care that a traveler must exercise in passing over a crossing that the court in instructing the jury should not stop with the generality that such person must use ordinary care for his own safety, but it should instruct the jury as to some, at least, of the duties of the traveler. *Malott v. Hawkins*, 127.
2. *Highway Crossings*.—*Degree of Care Required of Traveler*.—One about to cross a railroad grade crossing, except where a flagman signals him to cross, must look and listen for approaching trains, and, under exceptional circumstances, stop. *Malott v. Hawkins*, 127.
3. *Highway Crossings*.—*Duty to Look and Listen*.—*Presumption*.—The law will presume that one about to cross a railroad at grade actually saw what he could have seen if he had looked, and heard what he could have heard if he had listened. *Malott v. Hawkins*, 127.
4. *Highway Crossings*.—*Selection of Position to Look and Listen*.—A traveler approaching a railroad crossing is required to exercise ordinary care to select a place to look and listen for approaching trains where the acts of looking and listening will be reasonably effective. *Malott v. Hawkins*, 127.

RAILROADS—Continued.

5. *Highway Crossings.—Reciprocal Rights.*—Where a traveler at a public crossing has vigilantly used his senses to avoid danger, and is unable to see or hear an approaching train, he may, while still exercising due care, assume that the company will not omit to give the usual signal, if a train is approaching, especially the statutory signals. *Malott v. Hawkins, 127.*
6. *Duty to Maintain Highway Crossings.*—The duty imposed by statute upon railroad companies to keep highway crossings in reasonably safe condition for travel applies to crossings of highways laid out after the construction of the railroad as well as to those in existence at the time of its construction. *Baltimore, etc., R. Co. v. State, ex rel., 510.*
7. *Right of Way.—Highways.*—A railroad company acquires its right of way subject to the right of the State to extend public highways and streets across such right of way. *Baltimore, etc., R. Co. v. State, ex rel., 510.*
8. *Highway Crossings.—Mandamus.—Estoppel.*—The fact that a railroad company may be subject to an expense in the construction of a highway crossing is not a legitimate defense to a mandamus proceeding to require the construction of the crossing; since the question of damages, if any, arising out of the location of the highway over the railroad right of way, should have been presented for consideration and allowance to the board of commissioners in the proceeding to establish the highway. *Baltimore, etc., R. Co. v. State, ex rel., 510.*
9. The fact that an interstate railroad company had no actual notice of a highway proceeding, and did not appear thereto, and was awarded no damages, does not entitle it to be awarded damages in a mandamus proceeding to require it to construct a highway crossing; and the denial of such claim is not a taking of property without due process of law and without just compensation in violation of the fourteenth amendment of the federal Constitution. *Baltimore, etc., R. Co. v. State, ex rel., 510.*
10. *Conformity of Grade to Street Crossing.—Mandamus.*—To afford security to life and property at a railroad and street crossing, a city may, by mandamus, compel a railroad company to lower the grade of its roadbed so as to conform to the grade of the street. *Chicago, etc., R. Co. v. State, ex rel., 257.*

RECEIVERS—Jurisdiction of court in the appointment of a receiver for a railroad, see CORPORATIONS, 4; Chicago, etc., R. Co. v. Kenney, 72.

For rents during year of redemption from mortgage foreclosure sale, see MORTGAGES, 1-4; Russell v. Bruce, 553.

Review of complaint on appeal from interlocutory order, see APPEAL AND ERROR, 36; Chicago, etc., R. Co. v. Kenney, 72.

1. *Appointment.—Cause.*—It is not necessary that a party applying for a receiver should first exhaust his remedies at law, but it is sufficient if it appears that such remedies are inadequate, or would be ineffectual, or that the appointment of a receiver is necessary to preserve the property or to secure justice to the party. *Chicago, etc., R. Co. v. Kenney, 72.*
2. *Appointment.—Complaint.*—A complaint against a corporation for the appointment of a receiver is not defective because it does not set out specifically the facts from which the insolvency of the

RECEIVERS—Continued.

corporation could be inferred; the charge of insolvency in the language of the statute is sufficient.

Chicago, etc., R. Co. v. Kenney, 72.

3. *Appointment.*—In an application for the appointment of a receiver no error was committed in overruling a motion to postpone the proceeding until defendant could investigate some of the claims set out in the complaint, since the decision of the court as to such claims was interlocutory only, and not final, their validity being subject to full investigation and proof upon the final hearing.

Chicago, etc., R. Co. v. Kenney, 72.

4. *Appointment.—Insolvency.—Evidence.*—The action of the court in appointing a receiver for a railroad company on the application of creditors will not be reversed on the insufficiency of the evidence, where there was evidence that the judgments and other claims of some of the petitioners had long been due and unpaid, and that defendant, while admitting their justice and validity, persistently refused to pay them; that the property of defendant was encumbered by mortgages to its full value, and that it owed large sums in addition to its mortgage debts; that it owned no rolling stock nor rails, and that for more than three years past it had been unable to pay its employees.

Chicago, etc., R. Co. v. Kenney, 72.

5. *Jurisdiction.—Appearance.—Railroads.*—Where in an application for the appointment of a receiver the defendant entered a special appearance objecting to the jurisdiction of the court and filed a motion for the postponement of the hearing accompanied by an offer to pay into court a sum of money in discharge of certain claims admitted to be just, and submitted affidavits upon the question of the appointment of a receiver, the motion amounted to a demurrer and operated as a full appearance to the action and as a waiver of all objections to the jurisdiction of the court over its person.

Chicago, etc., R. Co. v. Kenney, 72.

6. *Creditor Not Required to Reduce Claim to Judgment.*—A creditor is not required to reduce his claim to judgment before asking for the appointment of a receiver.

Chicago, etc., R. Co. v. Kenney, 72.

7. *Actions Against.—Leave of Court.*—Under act of congress, 25 U. S. Stat., p. 436, the receiver of a railroad company appointed by the United States Court may be sued for damages for negligent killing in a state court without leave of the court making the appointment.

Malott v. Hawkins, 127.

8. *Report.—Exceptions.—Pleadings.*—The report of a receiver and an exception thereto, stand as the complaint and answer of the respective parties.

Johnson v. Central Trust Co., 605.

9. *Supplemental Report.*—Where a receiver filed a final settlement report to which exceptions were taken, the filing thereafter of a supplemental report did not serve to take the first out of the record.

Johnson v. Central Trust Co., 605.

10. *Jurisdiction.—Joint Action.*—An objection to the jurisdiction of the court over the subject-matter of an action for the appointment of a receiver for a railroad company, on the ground that no joint cause of action in the several plaintiffs was stated, is not well taken, since a common interest in the relief sought authorizes the joinder of several plaintiffs, although in other respects their interests are separate and distinct.

Chicago, etc., R. Co. v. Kenney, 72.

RECEIVERS—Continued.

11. *Effect of Discharge of Receiver on Judgment of Allowance.*—A judgment of allowance against a fund in the hands of a receiver does not become a technical lien on the property which comprises the assets, and therefore a discharge of the receiver without any reservation as to existing claims will release not only the receiver, but also the property, from further liability.

Johnson v. Central Trust Co., 605.

12. *Discharge of Receiver.*—*Collateral Provision for Payment of Claim.*—A collateral provision made by a receiver for the ultimate satisfaction of an allowance judgment against the trust fund will not justify the final discharge of the receiver before such judgment is paid, where it is not shown that the claimant was a party to the arrangement.

Johnson v. Central Trust Co., 605.

RECOGNIZANCE—Action to set aside, see **JUDGMENT**, 10; *State v. Hindman*, 586.

RECORDS—Alteration, see **COURTS**, 2, 3; *Johnson v. Gebbauer*, 271.

Transfer of land records from office of Secretary of State to office of Auditor of State, see **AUDITOR OF STATE**; *Fisher v. Brower*, 139.

REHEARING—New questions can not be considered at rehearing, see **APPEAL AND ERROR**, 43; *Indiana Power Co. v. St. Joseph, etc., Power Co.*, 42.

Court can not extend time, see **APPEAL AND ERROR**, 42; *Dudgeon v. Bronson*, 562.

REMONSTRANCE—Against granting license to sell intoxicating liquor, see **INTOXICATING LIQUORS**, 1-3; *Ragle v. Mattox*, 584; *Boomershine v. Uline*, 500.

RENTS—During year of redemption from mortgage foreclosure sale, see **MORTGAGES**, 1-4; *Russell v. Bruce*, 553.

RES GESTÆ—Books of account as part of, see **EVIDENCE**, 1; *Place v. Baugher*, 232.

RES JUDICATA—See **JUDGMENT**.

REVIEW—Of judgment, see **JUDGMENT**.

ROADS—See **HIGHWAYS**.

SALES—

Warranties.—*Expiration.*—*Action.*—Where a warranty accompanying the sale of a horse provided that it should be null and void after a specified date, the failure to sue or give notice of the breach of the warranty within such time amounts to a waiver of any right of action upon the warranty. *Wilson v. Ward*, 21.

SCHOOLS—

1. *Incorporation of City.*—*Vacation of Offices of School Trustees.*—The incorporation of a town as a city does not vacate the offices of school trustees thereof. *State, ex rel., v. Ogan*, 119.

2. *School Trustees.*—*Election.*—*Newly Incorporated City.*—Where the mayor and common council of a newly incorporated city elected three members of the school board instead of one, according

SCHOOLS—Continued.

- to law, without in any way designating which one was elected for three years, and continuously refused to appoint one trustee or to make any other appointment, no one of them was thereby legally elected. *State, ex rel., v. Ogan, 119.*
3. The provision of §5915 Burns 1901, that the common council of each city and the board of trustees of each incorporated town shall at their first regular meeting in the month of June elect three school trustees does not, in terms, apply to cities thereafter created. *State, ex rel., v. Ogan, 119.*
4. *Incorporation.—Title to School Property.*—The act of 1899 (Acts 1899, p. 376) providing "that in all cases where any city or incorporated town of this State has annexed, or shall hereafter annex, any territory, or where any town shall be hereafter incorporated in which territory so annexed or incorporated there was, or shall be, the property of any school township used by such school township for school purposes, and such school township was, or shall be, at the date of such annexation indebted," etc., the school corporation of such city or town shall be liable for such indebtedness and shall not be entitled to the possession of such property until it shall have paid such indebtedness, does not apply to school property embraced within a town which was incorporated prior to the passage of the act, and in such case, in the absence of any statute making the school city liable for the payment of the debt, the property passed by operation of law to the school city.
Maumee School Tp. v. School Town of Shirley City, 423.
5. *State University.—Endowment Fund.*—The permanent endowment fund of the State University is entitled to the same constitutional and statutory protection as is accorded to public school funds.
Fisher v. Brower, 139.
6. *State's Trust Fund.—Security.—Power of Legislature.*—For the protection of the State's trust fund, the legislature has power to make the security therefor paramount to tax and all other liens created or authorized by the State.
Fisher v. Brower, 139.
7. *Mortgage to Secure State University Endowment Fund.—Sale.—Priority.*—The purchaser of real estate, at the permanent endowment fund mortgage sale by the State Auditor, takes the real estate free from tax and assessment liens incurred after the execution of and during the time the land was under the mortgage.
Fisher v. Brower, 139.

SELF-DEFENSE—Instruction as to reasonable doubt, see CRIMINAL LAW, 12; *Clark v. State, 60.*

SPECIAL FINDING—Request for, see TRIAL, 19; *Terre Haute, etc., R. Co. v. State, ex rel., 438.*

Motion to modify, see TRIAL, 20; *Chicago, etc., R. Co. v. State, ex rel., 237.*

SPECIFIC PERFORMANCE—

1. *Complaint.—Default.*—In a suit for specific performance, a complaint is not good on demurrer which does not allege facts that would be sufficient upon default to enable the court to draft its decree from such averments.
Burke v. Mead, 252.
2. *Indefinite Contract.—Complaint.*—Where by the terms of a contract it was provided that the purchaser of real estate should pay to the owner a certain part of the consideration in cash,

SPECIFIC PERFORMANCE—Continued.

and the remainder in stock in a corporation to be organized, a complaint for the specific performance of the contract which does not allege the kind of business to be conducted by the corporation, and where the business was to be conducted, is insufficient on demurrer. *Burke v. Mead, 252.*

3. *Complaint.—De Jure Corporation.*—Where, in a suit for the specific performance of a contract to take stock in a corporation to be organized, a complaint alleging facts showing that the corporation would not, if so organized, be a *de jure* corporation, is insufficient on demurrer, although it contains the specific allegation that the incorporation was in all respects under and pursuant to the laws of Indiana. *Burke v. Mead, 252.*

4. *Complaint.—Demand.—Waiver.*—In a suit for the specific performance of an indefinite contract, the plaintiff is not relieved from pleading extraneous facts necessary to support the contract on the ground that defendant by making specific objections at the time of plaintiff's tender of performance waived all others. *Burke v. Mead, 252.*

5. Where a contract for the sale of real estate authorized a report from the purchaser, within five days, of his inability to accept the offer, a general averment in a complaint for specific performance, of performance of conditions by plaintiff is insufficient. *Burke v. Mead, 252.*

6. *Contract to Take Corporation Stock.—Complaint.*—Where the subscription of the whole capital stock of a corporation is a condition precedent to the enforcement of an executory contract to take stock, a complaint for the specific performance of such executory contract which shows on its face that all the capital stock was not subscribed, and contains no offer so to do, is insufficient. *Burke v. Mead, 252.*

7. *Contract.—Uncertainty.—Complaint.*—Where by the terms of a contract to convey land, by the terms of which a part of the consideration was to be paid in stock in a corporation to be organized, the nature of which corporation not being set out in the contract, an allegation in a complaint for specific performance, that, "after repeated conferences with plaintiffs, defendants, with full knowledge of all the facts, and in contemplation thereof and the proposed corporation, signed and delivered the contract," is not a sufficient allegation as to the character of the corporation agreed upon. *Burke v. Mead, 252.*

8. *Enforceable Contract.*—Courts of equity require as a prerequisite to a decree of specific performance, that, after summoning all evidence with which it is admissible to support the contract, its provisions shall be clear and specific in all of their essential elements. *Burke v. Mead, 252.*

9. *Contract.—Uncertainty.*—Since the *status* of both parties in a suit for specific performance is to be changed if a decree goes in favor of plaintiff, uncertainty in reference to plaintiff's duty is quite as fatal an objection to the granting of equitable relief as uncertainty in reference to defendant's obligations. *Burke v. Mead, 252.*

STATE UNIVERSITY—Endowment fund a public school fund, see **SCHOOLS**, 5; *Fisher v. Brower, 139.*

STATUTES—Title of act, see **CONSTITUTIONAL LAW**, 1; *Parks v. State, 211.*

STATUTES—Continued.

Question of construction of statute, see **APPEAL AND ERROR**, 88;
Deane v. State, 313.

When constitutionality of statute will not be passed upon, see
CONSTITUTIONAL LAW, 2, 8, 4; *Hart v. Smith*, 182; *Chicago, etc.*,
R. Co. v. Glover, 166; *State v. Wright*, 394; *Parks v. State*, 211.

For table of statutes cited and construed, see page **xxx**.

Amendments.—Construction.—Where an act is amended it will be construed as though the amendments as they exist had been incorporated in the original act. *Parks v. State*, 211.

STREET IMPROVEMENTS—See MUNICIPAL CORPORATIONS.

STREET RAILROADS—Sufficiency of evidence, see **EVIDENCE**, 2;
Citizens St. R. Co. v. Stockdell, 25.

Negligence of passenger in attempting to alight, see **NEGLIGENCE**, 2; *Indianapolis St. R. Co. v. Hockett*, 677.

1. **Defective Trolley Wire.—Negligence.**—In an action for an injury caused by a broken trolley wire, the jury might be able to find that the company was negligent in keeping in use a wire after it had become crystallized and weak, although there was no evidence as to what caused the wire to break at the "particular time and place," and no evidence as to any method by which to ascertain in advance "when" or "where" such wire might break.

Citizens St. R. Co. v. Bailey, 368.

2. **Defective Trolley Wire.—Injury to Traveler.—Special Finding.**—In an action by a traveler in a street against a street railway company for injuries caused by a broken trolley wire, alleged to have been negligently kept in use after it had become crystallized and weak, a special finding that the wire had not been subjected to any more than ordinary usage of wires "at that place" is not equivalent to a finding that the wire in question was only subjected to ordinary usage.

Citizens St. R. Co. v. Bailey, 368.

8. **Defective Trolley Wire.—Special Finding.**—In an action against a street railway company for injuries caused by a broken trolley wire, a finding of the jury that the wire broke "without warning," will be held to mean without warning to plaintiff.

Citizens St. R. Co. v. Bailey, 368.

SUMMONS—See PROCESS.

SUPPLEMENTAL PLEADING—See PLEADING, 6; *Jordan v. Indianapolis Water Co.*, 337.

SURETYSHIP—Of wife, see **HUSBAND AND WIFE**, 1, 2, 3, 4; *Cook v. Buhrlege*, 162; *Andrysiak v. Salkoski*, 428.

TAXATION—For construction of gravel roads, see **INJUNCTION**;
Board, etc., v. Spangler, 575.

For license to use vehicles, see **MUNICIPAL CORPORATIONS**, 3-9;
City of Terre Haute v. Kersey, 300; *Hogan v. City of Indianapolis*, 523.

Injunction to prevent the levying of illegal tax, see **PARTIES**;
Board, etc., v. Spangler, 575.

TAXATION—Continued.

1. *Illegal Assessment.—Injunction.—Premature Action.*—In the absence of a showing of an especial necessity therefor, a court of equity will not grant a writ enjoining the county auditor from the placing of an alleged illegal assessment upon the tax duplicate. Such a suit being in advance of a threatened levy by the county treasurer would be premature. *Smith v. Smith, 388.*
2. *Newspapers.—Good-Will.—Constitutional Law.*—The good-will that attaches to the business of conducting a newspaper belonging to a copartnership is not, in and of itself, property, within the meaning of the constitutional mandate requiring the General Assembly to provide for a uniform system of taxation of all property, except certain property that may be exempted by law. *Hart v. Smith, 182.*
3. The general act concerning taxation, §8408 *et seq.* Burns 1901, being silent on the subject of taxation of good-will, declaring in §8410 that "all property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation," and §8411 providing that personal property shall include certain described property, not mentioning good-will, does not authorize the taxation of the good-will of a newspaper. *Hart v. Smith, 182.*
4. No method is provided by law for the taxation of the good-will of a newspaper, since good-will is an incident of the business as a going concern, and the tax law requires that the various items constituting a newspaper plant must be assessed separately. *Hart v. Smith, 182.*
5. *State Board of Tax Commissioners.—Review of Acts by Court.*—Where the state board of tax commissioners has determined that shares of stock held by a company have a certain taxable value, such action, in the absence of fraud, is not reviewable by the courts. *Hart v. Smith, 182.*
6. *State Board of Tax Commissioners.—Injunction.*—Where the state board of tax commissioners acts without jurisdiction, the courts have the power to arrest the consequences of its acts. *Hart v. Smith, 182.*
7. *State Board of Tax Commissioners.—Increase of Assessment.—Injunction.*—Where part of an increased assessment made by the state board of tax commissioners was legal and part illegal, and there is no means of ascertaining the amount of the legal portion, the whole increase was properly held to be invalid. *Hart v. Smith, 182.*
8. *Injunction.—Collateral Attack.*—The proceeding to enjoin the state board of tax commissioners from taxing the good-will of a business being informal, the rule that obtains requiring that the infirmity appear on the face of the record in a collateral attack does not apply. *Hart v. Smith, 182.*

TENDER—

Pending Suit to Foreclose Lien.—Attorney's Fees.—Interest.—Where, on the day before the trial of a suit to foreclose a material-man's lien, the defendant tenders and pays into court the amount of the claim, including accrued costs, less attorney's fees and interest, such tender will not serve to exempt defendant from liability for attorney's fees and interest.

Chicago, etc., R. Co. v. Woodard, 541.

TOWNS—See MUNICIPAL CORPORATIONS.

TOWNSHIP TRUSTEE—As party, see **PLEADING, 4**; *Baltimore, etc., R. Co. v. State, ex rel., 510.*

TRADE-CHECKS—Payment of wages by, see **MASTER AND SERV-
ANT**, 15; *Dixon v. Poe*, 492.

TRADE-MARKS—Unlawful use of labeled bottles, see **CRIMINAL
LAW**, 5-8; *State v. Wright*, 422; *State v. Wright*, 394; *State v. Bar-
nett*, 432.

TRIAL—

1. *Opening Issues.—Discretion of Court.*—It is within the discretion of the trial court to refuse to open the issues and permit the filing of a motion after one trial of the cause has been had, and after the cause has been venued to another county and a large amount of costs had accumulated. *Fifer v. Ritter*, 8.
2. *Evidence.—Offer to Prove.—Exception.*—In order to save an excep-
tion to a ruling of the court in excluding evidence, the offer to prove must be made before such ruling. *Standish v. Bridgewater*, 386.
3. *Motion to Strike Out Evidence.—When Premature.*—Where a witness is permitted to testify to certain facts upon the promise to the court, made by the party offering the evidence, that other testi-
mony would be introduced which would render the offered evidence admissible, a motion to strike out made at the close of the witness' testimony, and not at the close of the testimony on that particular point, was premature. *Freese v. State*, 597.
4. *Practice.—Burden of Proof.—Opinion of Court.*—A motion by plaintiff that the court rule that the burden of proof is upon the defendant furnishes no ground for an exception. *Pittsburgh, etc., R. Co. v. Town of Crothersville*, 330.
5. *Master Commissioner.*—The action of the trial court in referring a suit, brought by the State, under the act of 1847 (Local Laws 1847, p. 77), against a railroad company for the recovery of surplus profits, as in the act provided, to a master, was not error. *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.
6. *Instructions.—General and Specific.*—Although instructions must be considered as a whole, general instructions given can not cure error committed in giving a specific instruction. *Clark v. State*, 60.
7. *Instruction.—When Incomplete.*—Where an instruction is correct as far as it goes, but incomplete, it may be completed by another which supplies the defects. *Johnson v. Gebhauer*, 271; *Harness v. Steele*, 286.
8. An instruction which states certain conditions under which there can be no recovery is not rendered bad because it does not state all such conditions. *Johnson v. Gebhauer*, 271.
9. *Instructions.—Harmless Error.*—No error was committed in refus-
ing an instruction which was irrelevant to the facts as found by the jury. *Indianapolis St. R. Co. v. Hockett*, 677.
10. An instruction relating to an alleged condition which the jury found, in answer to interrogatories, did not exist, was harmless, though erroneous. *Indianapolis St. R. Co. v. Hockett*, 677.
11. A judgment against a carrier for personal injuries will not be reversed because of an instruction that defendant was liable for the slightest "neglect resulting in an injury," where the jury was clearly informed in other instructions that there could be no recovery unless plaintiff had proved by a preponderance of the evidence that the injuries sued for were the direct and proximate result of defendant's negligence specified in the complaint. *Indianapolis St. R. Co. v. Hockett*, 677.

TRIAL—Continued.

12. *Evidence.—Instruction.*—In an action on a contract, evidence from which abandonment might be inferred is no reason for instructing on that subject, when no such issue was raised by the pleadings. *Jordan v. Indianapolis Water Co.*, 337.
13. *Instructions.—Credibility of Witnesses.—Weight of Evidence.*—In instructing the jury that they are the exclusive judges of the credibility of witnesses and the weight of the evidence, it is proper for the court to tell the jury that they "must" take into consideration the interest, the appearance on the witness-stand, the intelligence, and the opportunities for learning the truth of matters testified about. *Fifer v. Ritter*, 8.
14. *Instructions.—Measure of Damages.—Two Defendants.*—In an action against two defendants the failure of the court to instruct as to the measure of damages except in the event they found against one certain defendant, is not reversible error, where the court further instructed the jury that they might find against both defendants, or in favor of either and against the other. *Harness v. Steele*, 286.
15. *Interrogatories.*—The answer of the jury to interrogatories that there was "no evidence" of the facts so expected to be proved, was equivalent to a finding against the party propounding the interrogatories. *Indianapolis Abattoir Co. v. Temperly*, 651.
16. *Interrogatories.—Verdict.—Conflict.*—An answer to an interrogatory will not overcome the general verdict on account of conflict therewith, where it is also in conflict with another interrogatory. *Indianapolis Abattoir Co. v. Temperly*, 651.
17. Although many answers to interrogatories propounded to the jury tend to sustain the theory of the appellant, a general verdict for appellee will not be overthrown thereby, unless there is an irreconcilable conflict between such verdict and answers. *Johnson v. Gebhauer*, 271.
18. *General Finding.—Appeal.*—Where in an action by the State against a railroad company created under the act of 1847 (Local Laws 1847, p. 77), for the recovery of surplus profits under the provision of the statute, there was a general finding for the State for a designated sum without disclosing in detail the conclusion reached by the court, and enough of the items sued for are sustained by the evidence to equal the amount of the recovery, it is immaterial whether certain taxes paid by the corporation were paid as an excise on the earnings, and so a charge against the corporation, or a tax on the dividends declared, and therefore a charge against the stockholders. *Jordan, J.*, dissents. *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.
19. *Special Findings.—Request for.—Master Commissioner's Report.*—The signed writing or record of a trial judge, containing the approved and disapproved items of a master commissioner's report of a suit in equity against a railroad company for an accounting, and the conclusions of law stated in ruling upon exceptions thereto, made without request by either party for a special finding, is a general finding only, and specific findings and rulings can form no basis for appealable error. *Jordan, J.*, dissents. *Terre Haute, etc., R. Co. v. State, ex rel.*, 438.
20. *Special Finding.—Motion to Modify.*—A motion to modify special findings is not recognized by the code of procedure in this State, and such motion is properly overruled. *Chicago, etc., R. Co. v. State, ex rel.*, 237.
21. *Conclusions of Law.—Judgment.—Modification by Motion.*—The correctness of the conclusions of law can not be questioned by a

TRIAL—Continued.

motion to modify the judgment, nor does such motion present any question if the judgment rendered conforms to the conclusions of law. *Chicago, etc., R. Co. v. State, ex rel., 357.*

22. *Conclusions of Law.—Exceptions.*—To save any question for review by an exception to a conclusion of law, the same must be taken when the conclusions of law are filed.

Chicago, etc., R. Co. v. State, ex rel., 357.

23. *Recall of Jury Pending Deliberations.*—The provision of §550 Burns 1901, that any additional instructions or information given the jury upon their being recalled by the court pending their deliberations "shall be given in the presence of, or after notice to the parties or their attorneys," is mandatory. *Cox v. Peltier, 355.*

24. When the court recalls the jury pending their deliberations, and in the absence of a party or his counsel, in violation of §550 Burns 1901, lectures them for their failure to agree, the error is harmless if the evidence clearly shows that the verdict was right.

Cox v. Peltier, 355.

UNIVERSITY ENDOWMENT FUND—Enforcement of mortgage, see MORTGAGES, 12-14; Fisher v. Brower, 139; McElwaine-Richards Co. v. Gifford, 534.

VANDALIA CASE—See JUDGMENT, 2, 3, 4, 5, 6; Terre Haute, etc., R. Co. v. State, ex rel., 438.

VENDOR AND PURCHASER—

1. *Vendor's Lien.*—Where a purchaser of real estate who had paid nothing thereon, conveyed the same to a third person upon the agreement of the parties that the first purchaser should be released from his liability on account of the purchase and the latter purchaser pay the consideration therefor, the transaction was the same in legal effect as if the first vendor had sold and conveyed the land to such third person, and he was entitled to a vendor's lien for the unpaid purchase money. *Scott v. Edgar, 38.*

2. *Vendor's Lien.—Husband and Wife.*—Where a husband entered into an agreement with the owner of real estate for the purchase thereof and caused to be conveyed land owned by his wife in part payment therefor, gave his note for the balance of the purchase money and took the title of the real estate so purchased in the name of his wife, the wife being a party to the transaction, was bound, in the absence of fraud, to take notice of the terms and conditions upon which the conveyance of the land was made to her.

Scott v. Edgar, 38.

3. *Vendor's Lien.—Acceptance of Note of Vendee's Husband.—Waiver.*—The acceptance by a vendor of the note of the vendee's insolvent husband, payable in a bank in this State, for the balance of purchase money, did not amount to a waiver of a vendor's lien.

Scott v. Edgar, 38.

4. *Acceptance of Deed.—Mistake.—Laches.*—Where a deed is accepted as security for the payment of a note, and it is afterward learned that the deed did not include all the land intended, the grantee affirms the contract thus consummated if he does not with reasonable promptitude reconvey or offer to reconvey the real estate, and tender back the note.

Horner v. Lowe, 406.

5. *Purchase-Money Notes.—Transfer.—Liens.—Set-off.*—A vendor conveyed land receiving two negotiable notes for the unpaid purchase price, due at different dates, secured by mortgage on the

VENDOR AND PURCHASER—Continued.

premises conveyed. He assigned the note last matured to an innocent purchaser, for value, before maturity, and transferred the other note to plaintiff after the maturity thereof. *Held*, that the vendee was entitled to set off against the non-negotiable note a sum that he had been compelled to pay in satisfaction of a pre-existing lien on the real estate conveyed. *Wolf v. Shelton*, 531.

VERDICT—Conflict with answers to interrogatories, see **TRIAL**, 16, 17; *Indianapolis Abattoir Co. v. Temperly*, 651; *Johnson v. Gebhauer*, 271.

WAGES—Payment by trade-checks, see **MASTER AND SERVANT**, 15; *Dixon v. Poe*, 492.

Penalty for failure to pay monthly, see **MASTER AND SERVANT**, 13, 14; *Chicago, etc., R. Co. v. Glover*, 166.

WARRANTIES—Waiver of, see **SALES**; *Wilson v. Ward*, 21.

WATERS AND WATER COURSES—Lease of water privilege, see **LANDLORD AND TENANT**, 12; *Jordan v. Indianapolis Water Co.*, 357.

WIDOW—Absolute allowance, see **EXECUTORS AND ADMINISTRATORS**, 5, 6, 7; *Brown v. Bernhamer*, 538.

WIFE DESERTION—Prosecution barred by two years' statute of limitation, see **CRIMINAL LAW**, 9; *State v. Langdon*, 377.

WILLS—

1. *Conditional Bequests.—Construction.*—A testator by the terms of his will gave certain property to his wife and provided for the payment of certain annuities to the wife and others until the charter of a bank of which he was a stockholder should expire, when specific legacies should be paid them, if they be then living. The will further provided that should testator have no issue alive at the time of the expiration of the bank charter, the residue of his estate should go to certain named beneficiaries. Testator lived until after the expiration of the bank charter, and died without issue, leaving his wife surviving, who renounced the will. *Held*, that the will was not conditional, dependent upon the death of the testator before the expiration of the bank charter. *Murphey v. Brown*, 106.

2. *Husband and Wife.—Renunciation by Wife.—Descent and Distribution.*—Where a man died testate without issue leaving neither father nor mother, his widow, upon the renunciation of the will, is not entitled to all of his estate under §2651 Burns 1901, by virtue of the provision of §2648 Burns 1901, "that nothing in this act shall be construed to reduce the interest the law now gives a widow in the estate of her deceased husband."

Murphey v. Brown, 106.

3. *Perpetuities.*—An item in a will providing legacies in violation of the statute against perpetuities will not invalidate the entire will, where the legacies had lapsed by reason of the death of the legatees prior to the death of testator. *Murphey v. Brown*, 106.

4. *Residuary Legacies.—Construction.*—Where a will made certain specific bequests payable at the time of the expiration of a bank

WILLS—Continued.

charter, and provided if testator had no child alive at that time "then in that case I give, devise, and bequeath, upon the expiration of the bank charter and the final settlement of my estate" all the rest and remainder of the property to those who may be then living of the persons named as residuary legatees, the legacies to the residuary legatees vested at the death of the testator.
Murphey v. Brown, 106.

WITNESSES—Judge as witness, see JUDGMENT, 12; *State v. Hindman, 586.*

WORDS AND PHRASES—Contradictory words in indictment, see CRIMINAL LAW, 8; *State v. Barnett, 432.*

When word "person" does not apply to corporation, see MORTGAGES, 11; *Studebaker Bros. Mfg. Co. v. Morden, 173.*

WORK AND LABOR—Payment of wages with trade-checks, see MASTER AND SERVANT, 15; *Dixon v. Poe, 492.*

Penalty for failure to make monthly payment of wages, see MASTER AND SERVANT, 13, 14; *Chicago, etc., R. Co. v. Glover, 166.*

WRIT OF ASSISTANCE—To grantee of purchaser at mortgage foreclosure sale, see MORTGAGES, 8-10; *Emerick v. Miller, 317.*

Ex. J. M.



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